IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1740

MIDWEST HANGER CO. and LIBERTY ENGINEERING CORP.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

IN THE

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No.

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MIDWEST HANGER CO. and LIBERTY ENGINEERING CORP., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

——

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 31, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals appears at 550 F.2d 1101, 94 LRRM 2878 (8th Cir. 1977). The opinion of the National Labor Relations Board appears at 221 NLRB No. 135, 91 LRRM 1218 (1975). These opinions appear in the Appendix, attached hereto.[1]

[1] All references to the Appendix will be designated "App."

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1977 (App. 5a). This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC § 1254(1).

QUESTION PRESENTED

Whether a Company's offer to reinstate discharged employees which is made conditional upon the Union's promise to request the National Labor Relations Board to withdraw an unfair labor practice charge it filed as a result of the discharges tolls the Company's backpay liability where the discharges are subsequently found to be in violation of the National Labor Relations Act.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

> Section 157. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> Section 158(a). It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .
>
> Section 171 (a). . . . sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interest of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees.
>
> Section 173(d). Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

NLRB Rules and Regulations, Series 8, as amended (29 CFR)

> Sec. 102.9 Who may file; withdrawal and dismissal.—A charge that any person has engaged in any unfair labor practice affecting commerce may be made by any person. Any such charge may be withdrawn, prior to the hearing, only with the consent of the regional director with whom such charge was filed; at the hearing and until the case has been transferred to the Board pursuant to section 102.45, upon motion, with the consent of the administrative law judge designated to con-

duct the hearing; and after the case has been transferred to the Board pursuant to section 102.45, upon motion, with the consent of the Board. Upon withdrawal of any charge, any complaint based thereon shall be dismissed by the regional director issuing the complaint, the administrative law judge designated to conduct the hearing, or the Board.

Sec. 102.52 Initiation of proceedings; issuance of backpay specification; issuance of notice of hearing without backpay specification.—After the entry of a Board order directing the payment of backpay or the entry of a court decree enforcing such a Board order, if it appears to the regional director that a controversy exists between the Board and a respondent concerning the amount of backpay due which cannot be resolved with a formal proceeding, the regional director may issue and serve on all parties a backpay specification in the name of the Board. The specification shall contain or be accompanied by a notice of hearing before an administrative law judge at a place therein fixed and at a time not less than 15 days after the service of the specification. In the alternative and at his discretion, the regional director may, under the circumstances specified above, issue and serve on the parties a notice of hearing only, without the backpay specification, the hearing to be held before an administrative law judge, at a place therein fixed and at a time not less than 15 days after the service of the notice of hearing.

STATEMENT OF THE CASE

Petitioner, Midwest Hanger Co. and Liberty Engineering Corporation ("Company") operates a small business producing machinery and laundry and drycleaning packaging products. On October 8, 1971, the National Labor Relations Board ("Board") found

that the Company had violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 USC §§ 158(a)(1)(3), by discharging 18 employees because of their union activity. The Board ordered the Company to offer these employees reinstatement to their former jobs or substantially equivalent positions and to make them whole for any loss of earnings suffered as a result of the discrimination against them. *Midwest Hanger Co. and Liberty Engineering Corp.*, 193 NLRB 616, 628-629 (1971). The United States Court of Appeals for the Eighth Circuit enforced the Board's order as to 17 of the discriminatees. *NLRB* v. *Midwest Hanger Co. and Liberty Engineering Corp.*, 474 F.2d 1155 (8th Cir. 1973). This Court denied the Company's petition for a writ of certiorari. *Midwest Hanger Co. and Liberty Engineering Corp.* v. *NLRB*, 414 U.S. 823 (1973).

When the Company and the Board were unable to reach agreement on the amount of backpay due the 17 discriminatees, a supplemental backpay proceeding was instituted pursuant to the Board's Rules and Regulations, Series 8, as amended, (29 C.F.R.), Section 102.52, et seq., for the purpose of determining such amount. The backpay proceedings consisted of a hearing before an Administrative Law Judge ("ALJ") in September and November of 1974 and summary affirmance by the Board in December, 1975, of the ALJ's recommendation to award backpay to the 17 discriminatees in the aggregate sum of $112,530 plus interest at 6% per annum from the dates of the discharges in 1970. *Midwest Hanger and Liberty Engineering Corp.*, 221 NLRB No. 135, 91 LRRM 1218 (1975) (App. 16a). The United States Court of Appeals for the Eighth Circuit enforced the Board's

order as to 16 of the discriminatees and remanded to the Board on the question of backpay liability owing Elaine Peukert. *NLRB* v. *Midwest Hanger and Liberty Engineering Corp.*, 550 F.2d 1101, 94 LRRM 2878 (8th Cir. 1977) (App. 5a). On April 27, 1977, the Board issued a Second Supplemental Decision and Order modifying the backpay due Elaine Peukert in accordance with the finding of the Court of Appeals. 229 NLRB No. 48 (1977) (App. 1a).

The principal issue in the backpay proceeding was whether the Company had made a legally sufficient offer of reinstatement to the discriminatees on October 25, 1970, tolling its backpay liability as of that date (App. 9a, 20a). The offer in question grew out of a strike which commenced at the Company on the evening of Thursday, October 22, 1970, and followed the filing of unfair labor practice charges against the Company for discharging certain employees in June and July of 1970. The Company and the striking employees began meeting the next day. The strikers wanted recognition for their Union, the United Steelworkers of America ("Union"), and initially wanted the Company to reinstate twenty-six employees the Company had discharged. The Company wished the strike settled because the busy season of the year was approaching and it feared the strike would affect production (App. 9a-10a, 21a-23a).

Shortly after these meetings began, the Company learned that the Union was only pressing for reinstatement of 13 of the original 26 dischargees. On October 25, Company President Jones proposed that those 13 employees which the Union wished reinstated be returned to their jobs without discrimination, loss of pay or seniority. The offer was for the employees

to return to work the following day. Jones also agreed to recognize the Union and commence bargaining on a contract. This seemed acceptable to the Union negotiating committee (App. 9A-10a, 22a).

Almost immediately after Mr. Jones had made his offer, Mr. Madden, the Company's labor attorney, remarked at part of the "wrap-up" that there were still unfair labor practice charges pending against the Company. Mr. Andrew, an organizer for the Union, replied that he would withdraw them, but Mr. Madden cautioned that as the National Labor Relations Board was a third party to the proceedings all the Union could do was to request withdrawal (App. 10a-11a, 23a-28a).

At that point the Company believed it had an agreement, but one member of the Union negotiating committee then dropped a "bombshell". He demanded backpay for the dischargees. The Union committee asked for and obtained a recess to discuss this new development among themselves and with the employees picketing in the Company's parking lot (App. 9a-10a, 22a-23a).

When the committee returned, Mr. Andrew said to Mr. Madden that the strikers liked the Company's reinstatement offer, but the discharged employees wanted backpay. Mr. Jones interrupted and said, "I think I can answer that question for you. The answer is 'no'."[2] Mr. Jones then left the meeting and no

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[2] It is undisputed, and the Court of Appeals so found, that had the Union accepted the Company's offer of reinstatement solely because the Company would not give the discriminatees backpay, that such reinstatement would have tolled backpay liability (App. 10a). *D'Armigene, Inc.*, 148 NLRB 2, 15 (1964), *enforced as modified*, 353 F.2d 406 (2d Cir. 1965); *Reliance-Clay Products*, 105 NLRB 135 (1953).

further offer of reinstatement was made at that time (App. 9a-10a, 22a-23a). The Union did not seek withdrawal of the unfair labor practice charge and the Board's Regional Office proceeded to litigate the discharges. As previously stated, the Board, affirming the ALJ, found against the Company[3] and the Eighth Circuit enforced the Board's order.[4] The discriminatees were again offered reinstatement in late 1973 as part of the Company's compliance with the Board's order in the unfair labor practice segment of this case (App. 32a).

The Company argued at the backpay hearing before the ALJ that its liability for the unfair labor practices ceased on October 25, 1970, upon President Jones' unconditional offer of reinstatement. The ALJ rejected this claim and found that the Company's reinstatement offer did not toll backpay because it was made conditional, *inter alia,* upon the Union's dropping the unfair labor practice charge.[5] As a result, the ALJ concluded that the backpay period did not terminate until "proper" offers of reinstatement were made in 1973 (App. 21a, 30a). The Board affirmed this result (App. 16a) and the Court of Appeals "refuse[d] to disturb the Board's finding that the Company conditioned its offer of reinstatement of October 25, 1970,

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[3] *Midwest Hanger Co. and Liberty Engineering Corp.*, 193 NLRB 616 (1971).

[4] *NLRB* v. *Midwest Hanger and Liberty Engineering Corp.*, 474 F.2d 1155 (8th Cir. 1973).

[5] The ALJ also found that the Company's reinstatement offer of October 25 was conditioned on the employees' ending their strike, improvement in absenteeism and the changing of jobs by some employees and the taking of a physical examination by one employee (App. 12a, fn. 7)

upon the dropping of the unfair labor practices charges". The Court found it unnecessary to determine whether the reinstatement offer was also conditional upon the other factors found by the ALJ (see, fn. 5, *supra*) (App. 12a).

REASON FOR GRANTING THE WRIT

The Decision Below Incorrectly Interprets The National Labor Relations Act With Regard To Offers Of Reinstatment And The Tolling Of Backpay Liability Owed Discrimnatees

The question presented by this petition is whether an offer of reinstatement to employees later found to have been discriminatorily discharged in violation of Section 8(a)(3) of the National Labor Relations Act, which is allegedly conditioned upon the Union's promise to ask the National Labor Relations Board to withdraw an unfair labor practice charge related to the discharges, is a valid offer tolling the employer's backpay liability to the discharged employees.[6] This narrow issue raises an important and substantial question concerning the National Labor Relations Act which requires resolution by this Court.

The Company made its offer of reinstatement in an effort to voluntarily settle the dispute over which the employees had struck on October 22, 1970. The Company requested that the Union ask the Board to withdraw the unfair labor practice charge because it wanted to wipe the slate clean before it began negotiating for a collective bargaining agreement with

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[6] The Company made the additional factual argument before the Court of Appeals that its offer of reinstatement was not conditional upon the Union seeking withdrawal of the unfair labor practice charge. However, this argument was rejected by the Court below and is not renewed in this petition.

the Union. This attempt to totally resolve the dispute over the discharges and the Union's request for recognition without Government intervention was consistent with Congress' expressed preference for voluntary resolution of labor disputes. Therefore, the Company should have been found to have made a proper offer of reinstatement.

In enacting the Labor-Management Relations Act ("LMRA") of 1947, popularly known as the Taft-Hartley Act, Congress stated:

> "Section 201. That it is the policy of the United States that—
>
> (a) sound and stable industrial peace and the advancement of the general welfare, health and safety of the Nation and of the best interest of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees." (29 USC §171(a)).

Section 203(d) of the Taft-Hartley Act further provides:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes." (29 USC §173(d)).

Pursuant to these provisions of the Act, voluntary reinstatement offers and strike settlement agreements are encouraged by the National Labor Relations Board and the Courts. *See, Retail Clerks Int'l Assn., Local Unions No. 128 and 633* v. *Lion Dry Goods, Inc.,* 369 U.S. 17, 27 (1961); *United Aircraft Co., Inc.,* 192 NLRB 382, 387 (1971). It is true, however, that the

Board and the Courts have long established that reinstatement offers which require the union or the unlawfully discharged employees to forego basic rights under NLRA, Section 7 (29 USC §157) are invalid and, if rejected, do not toll the Company's backpay liability to the discriminatees. *American Mfg. Co.,* 5 NLRB 443, 467 (1938), enf. in pertinent part, 166 F.2d 61 (2nd Cir. 1939). Thus, for example, offers of reinstatement conditioned upon the employee's agreeing to withdraw from the union[7] or refraining from engaging in union activity[8] are not valid offers terminating the backpay period.

The right to join a union and to engage in union activities are basic Section 7 rights which, if sacrificed in exchange for reinstatement, would result in a weakening or elimination of the collective bargaining relationship between the Company and its employees. *Fein's Tin Can Co., Inc.,* 23 NLRB 1330, 1358-1359 (1940). Consequently, an offer of reinstatement conditioned upon the employees' agreement to sacrifice basic and substantial Section 7 rights is not an offer to settle a labor dispute voluntarily within the confines of a collective bargaining relationship, but rather is a measure aimed at undermining that relationship by weakening the union. *Mackie-Lovejoy Mfg. Co.,* 130 NLRB 172, 173-174 (1953).

The Company believes that its reinstatement offer of October 25, 1970, although found to have been made conditional upon the Union's promise to request with-

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[7] *NLRB* v. *Dee's of New Jersey, Inc.,* 395 F.2d 112 (3rd Cir. 1968); *NLRB* v. *Garland Knitting Mills,* 408 F.2d 672 (5th Cir. 1969).

[8] *Ridgely Manufacturing Co.* v. *NLRB,* 510 F.2d 185 (D.C.Cir. 1975).

drawal of the unfair labor practice charge, has improperly been grouped by the Board and the Court of Appeals in the category of offers which severly interfere with Section 7 rights (App. 12a, 28a).[9] To date, no effort has been made by the Board or by any court to point out very important distinctions between an offer of reinstatement conditioned on an employee's promise to refrain from union activity as opposed to an offer conditioned on a promise by a union to seek withdrawal of an unfair labor practice charge. This is surprising since there are significant differences involved which could bear upon the issue of termination of backpay liability owed discriminatees.

The first basic difference is that an offer conditioned on a union's promise to seek withdrawal of an unfair labor practice charge is aimed at promoting a peaceful collective bargaining relationship with the union, whereas an offer conditioned on the employees' refraining from union activity or resigning from union membership can only lead to destruction of that relationship. Had the Union accepted the Company's reinstatement offer in exchange for its promise to seek withdrawal of the charge, the parties would have been left in a positive posture from which equitable and effective contract negotiations would have proceeded. The Union's bargaining position would have been enhanced by its ability to procure the immediate reinstatement of the discharged employees and the Company would have approached bargaining free from the pendency of the unfair labor practice charge with its potential for monetary liability. On the other hand,

[9] See, *NLRB* v. *St. Mary's Sewer Pipe Co.*, 146 F.2d 995 (3rd Cir. 1945); *Denver Fire Reporter and Protective Co.*, 119 NLRB 1187 (1957).

had the Company required that the employees resign from the Union in order to obtain reinstatement or sought some other condition impairing substantial Section 7 rights, and the employees complied, then, as previously shown, the direct result would have been a weakening of the Union and the collective bargaining relationship, and further industrial strife might well have ensued. *Fein Tin Can Co., Inc., supra.*

Secondly, there is a significant difference as to how each condition can be achieved. An agreement to refrain from Union activity or to withdraw from the Union could have been unilaterally complied with by the employees offered reinstatement and would thereby have automatically and directly interfered with the employees' Section 7 rights. To the contrary, once the unfair labor practice charge was filed with the National Labor Relations Board's Regional Office, the charge fell within the exclusive jurisdiction of the Board and the Union had no legal authority to interfere with the Board's proceedings. *NLRB* v. *Gemalo,* 130 F.Supp. 500 (SDNY 1955). The Union, at most, could have requested the Board to withdraw the charges it had filed. It would then have been solely within the discretion of the Regional Director to further proceed with the matter or agree to the Union's request to withdraw the charge. NLRB Rules and Regulations, Series 8, as amended (29 CFR), Section 102.9. In so doing, the Regional Director would have used his own judgment, backed with the expertise of his staff, to determine whether a basic purpose of the Taft-Hartley Act, the settlement of disputes peaceably by voluntary methods (29 USC §§ 171(a), 173(d), *supra*), suggested approval of the Union's request to withdraw the charge, or whether the alleged

interference with Section 7 rights was so pervasive that the only effective recourse would be the prosecution of a complaint. Had the strike been settled, and withdrawal sought by the Union, the Board may well have agreed to the withdrawal of the charge. However, even under those circumstances, the Regional Director would have been under no obligation to permit the charge to be withdrawn, but could have proceeded to issue a complaint and litigate the unfair labor practice allegations.

It is, therefore, apparent that had the Union promised to seek withdrawal of the unfair labor practice charge, the direct impact on Section 7 rights of the employees would have been far less than had the reinstated employees been compelled to resign from the Union or otherwise give up substantial Section 7 rights. That is not to deny that acceptance of such condition by the Union would not have impacted on the protection afforded its members by the NLRA. Had the Union accepted the Company's reinstatement offer and successfully sought withdrawal of the unfair labor practice charge, the discriminatees would have foregone the possibility of being awarded backpay for the brief (4 month) period they were discharged. However, in exchange the employees would have received *immediate* full reinstatement (rather than the reinstatement they eventually received three-and-one-half years after their discharges) and the negotiation of a collective bargaining agreement would have ensued *immediately* (again, rather than three-and-one-half years later). The latter result would have been far more consistent with the Congressional mandate for voluntary dispute resolution as set forth in LMRA Sections 201(a) and 203(d) and with this

Court's preference for keeping labor disputes outside the courtroom.[10] Had the Union expected that backpay would have been tolled by the reinstatement offer, it is most probable the offer would have been accepted and the parties would have settled into a peaceful collective bargaining posture three-and-one-half years earlier than in fact occurred.

The facts presented by this petition do not occur infrequently. It is, therefore, important that management and labor have the benefit of this Court's view of whether an offer of reinstatement conditioned on the Union's promise to seek withdrawal of an unfair labor practice charge is valid and tolls backpay or is invalid, since it significantly interferes with the employees' Section 7 rights.

Accordingly, the Company submits that this petition presents an important question bearing on the administration of the National Labor Relations Act and respectfully requests that this Court grant review.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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[10] See, generally, the "Steelworker's Trilogy"—*United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel*, 363 U.S. 593 (1960); and this Court's recent opinion, *Nolde Bros.* v. *Bakery Workers*, —— U.S. ——, 94 LRRM 2753 (March 7, 1977).

APPENDIX

229 NLRB No. 48

FJP
D—2385
Liberty, Mo.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 17—CA—4331

MIDWEST HANGER CO. AND
LIBERTY ENGINEERING CORP.

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO

Second Supplemental Decision and Order

On October 8, 1971, the National Labor Relations Board issued its Decision and Order directing that Respondent make whole certain employees for their losses resulting from Respondent's unfair labor practices in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended.[1] On February 20, 1973, the United States Court of Appeals for the Eighth Circuit issued its judgment enforcing the Board's Order.[2] Respondent's petition for certiorari to the United States Supreme Court was denied on October 9, 1973.[3]

On June 7, 1974, the Regional Director for Region 17 issued a backpay specification and notice of hearing to which Respondent filed an answer and an amended answer. A hearing was held before Administrative Law Judge Julius Cohn on September 10 through 13, and November

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[1] 193 NLRB 616.

[2] 474 F.2d 1155.

[3] 414 U.S. 823.

11 through 15, 1974, for the purpose of determining the amount of backpay due the discriminatees. On May 20, 1975, the Administrative Law Judge issued a Supplemental Decision in which he found that the discriminatees were entitled to backpay as set forth in his recommended Order.

On December 1, 1975,[4] the Board issued a Supplemental Decision and Order which adopted as its backpay order the recommended Order of the Administrative Law Judge. On March 3, 1977, the United States Court of Appeals for the Eighth Circuit issued its judgment enforcing the Board's Order with the exception of employee Elaine Peukert's backpay award which was remanded to the Board for the purpose of excluding therefrom the period November 6, 1972, to January 22, 1973.[5]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In response to the court's remand, we make the following modifications in Peukert's backpay award:

As indicated in the Appendix of the Administrative Law Judge's Supplemental Decision, he found, in agreement with the General Counsel's backpay specification, that Peukert was entitled to gross backpay in the amount of $1,629 for 11 of the 13 weeks in the fourth quarter of 1972.[6] However, as the court directed the exclusion from that quarter of the 8 weeks from November 6 to December 31, 1972, we find that Peukert's gross backpay amounted to $444 for 3 weeks in the fourth quarter of 1972. Accordingly, as her net interim earnings of $589 exceeded the gross

[4] 221 NLRB 911.

[5] 94 LRRM 2878, 81 LC ¶ 13,095.

[6] The gross backpay for the entire quarter would have been $1,926.

backpay, Peukert was not entitled to any net backpay for the quarter.

The Administrative Law Judge also found, in agreement with the General Counsel's backpay specification, that Peukert's gross backpay was $1,953 for the entire 13 weeks in the first quarter of 1973. However, as the court directed the exclusion from that quarter of the 3 weeks from January 1 to 22, 1973, we find that Peukert was entitled to gross backpay in the amount of $1,502 for 10 weeks in that quarter. Accordingly, Peukert's net backpay for the quarter represents the difference between the gross backpay of $1,502 and the net interim earnings of $1,166, namely, $336.

In view of the revised net backpay for the two quarters in question, we conclude that Peukert's total net backpay amounts to $12,557 rather than the $14,048 stated in the Administrative Law Judge's Appendix. We therefore so amend our backpay order. We shall also attach hereto a revision of that portion of the Appendix which pertains to Peukert.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board, in accordance with the remand of the United States Court of Appeals for the Eighth Circuit, revises its backpay order by reducing the net backpay for Elaine Peukert from $14,048, to $12,557.

Dated, Washington, D.C. April 27, 1977.

JOHN H. FANNING, *Chairman*

HOWARD JENKINS, JR., *Member*

JOHN A. PENELLO, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

REVISED APPENDIX

Name	Year and Quarter	Gross Backpay	Interim Earnings	Expenses	Net Interim Earnings	Net Backpay
Elaine Peukert	1970-3	$1,352	$ None	$	$ None	$1,352
	1970-4	1,354	None		None	1,354
	1971-1	1,440	None		None	1,440
	1971-2	1,665	26		26	1,639
	1971-3	1,819	624		624	1,195
	1971-4	2,085	618	24	594	1,491
	1972-1	2,069	686	33	653	1,416
	1972-2	1,713	1,033	56	977	736
	1972-3	1,953	1,392	21	1,371	582
	1972-4	444	603	14	589	None
	1973-1	1,502	1,187	21	1,166	336
	1973-2	1,953	1,505	21	1,484	469
	1973-3	1,979	1,458	21	1,437	542
	1973-4	667	676	14	662	5
Total						$12,557

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-1261

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

MIDWEST HANGER CO. AND LIBERTY ENGINEERING CORP., *Respondent.*

Judgment

Before: LAY, BRIGHT and STEPHENSON, *Circuit Judges.*

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of a supplemental order issued by it against Respondent, Midwest Hanger Co. and Liberty Engineering Corp., Kansas City, Missouri, its officers, agents, successors, and assigns, on December 1, 1975. The Court heard argument of respective counsel on November 11, 1976. and has considered the briefs and transcript of record filed in this cause. On March 3, 1977, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's supplemental order, with the exception of the Peukert back pay award. The Peukert award is remanded to the Board for further proceedings not inconsistent with the Court's opinion. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondent, Midwest Hanger Co. and Liberty Engineering Corp., Kansas City, Missouri, its officers, agents, successors, and assigns, shall make the employees involved in this proceeding whole by payment to them of the following amounts together with interest at the rate of 6 percent per annum, in the manner set forth in the section of the Administrative Law Judge's Supplemental Decision en-

titled "The Remedy," and continuing until the amounts are paid in full, but minus tax withholding required by Federal and State laws:

John Ashby	$13,710
Kin Bristow Woods	11,302
Margaret Buckley	6,846
David Covey	7,286
Joseph DeMent	8,731
June Elliott	8,737
James W. Forbis	6,594
Ronald Greathouse	3,010
William Greathouse	6,197
Marilyn Kimberlin	5,118
John Charles Lankford	11,844
Shirley Lauderdale Chamberlin	1,860
Sharon Meier	1,167
Michael Owens	781
Virgie Peterson McCannon	4,907
John Sells	1,392

IT IS FURTHER ORDERED AND ADJUDGED by the Court that the Peukert award be and it is hereby remanded to the Board for further proceedings not inconsistent with the Court's opinion.

DATED: March 31, 1977.

Costs taxed in favor of National Labor Relations Board:

Costs of printing 5 copies of Appendix:	$334.90
Costs of printing 10 copies of brief of Labor Board:	$358.98
Total costs of Labor Board for recovery from Midwest Hanger Co. and Liberty Engineering Corp:	$693.38

April 21, 1977

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

(Caption Omitted in Printing)

On Application for Enforcement of a Supplemental Order of the National Labor Relations Board

Submitted: November 11, 1976

Filed: March 3, 1977

Before LAY, BRIGHT and STEPHENSON, *Circuit Judges.*

STEPHENSON, *Circuit Judge.*

The National Labor Relations Board (Board) petitions for enforcement of its supplemental back pay order issued against Midwest Hanger Company and Liberty Engineering Corporation [1] (Company) directing the Company to pay approximately $112,000 [2] to 17 persons who had been discriminatorily discharged by the Company in violation of sections 8(a)(3) and (1) of the National Labor Relations Act. The ultimate issue raised here concerns the appropriateness of the Board's back pay order. We find, that except for discriminatee Elaine Peukert's award, the Board's back pay order is appropriate.

On October 8, 1971, the Board issued a decision and order, 193 N.L.R.B. No. 85, declaring that the Company had discriminatorily discharged 18 employees and refused to reinstate another employee because of their union activity. The Board ordered reinstatement with back pay for all concerned employees and further entered a bargaining order based upon its finding that the Company's actions precluded the holding of a valid election. This court

[1] The two companies are operated as a single economic entity.

[2] This figure does not include the 6% per annum interest charge.

enforced the Board's order as to 17 of the discriminatees. *NLRB* v. *Midwest Hanger Co. & Liberty Engineering Corp.*, 474 F.2d 1155 (8th Cir.), *cert. denied*, 414 U.S. 823 (1973).

As the parties were unable to agree on the amount of back pay due to the 17 discriminatees, the regional director issued a back pay specification dated June 7, 1974. The Company filed an answer and an amended answer thereto. Thereafter, a hearing was held before an administrative law judge to resolve the issues raised by the Company's answer and to establish the amount of back pay due. Testimony was taken on the Company's contention that it had made a proper offer of reinstatement to certain discriminatees on October 25, 1970, thereby ending the back pay period on that date. Further evidence was introduced concerning the propriety of the formula used by the regional director in computing gross back pay and the Company's contentions that the employment of certain discriminatees would have been terminated during the back pay period because of economic reductions in the work force or excessive absenteeism, and that certain discriminatees had incurred willful losses of earnings by failing to make reasonable efforts to obtain suitable interim employment.

On May 20, 1975, the administrative law judge issued his decision, finding that the 17 discriminatees were entitled to back pay totalling $112,530. The Company filed exceptions and on December 1, 1975, the Board affirmed the rulings, findings, and conclusions of the administrative law judge and ordered the Company to pay the discriminatees the amounts set forth in the administrative law judge's decision. This petition by the Board for enforcement of its supplemental back pay order followed.

We enforce in part and remand in part.

The first issue raised by the Company concerns an offer of reinstatement made on October 25, 1970, by Carl Jones,

the president of Midwest Hanger Company. It is undisputed that the back pay period for the discriminatees began when they were discharged in June or July, 1970. The Company contends that the back pay period terminated on October 25, 1970. The Board found, however, that the October 25 offer of reinstatement was not unconditional, thereby holding that the back pay period did not terminate until proper offers of reinstatement were made in November 1973.[3] Our review of the record as a whole convinces us there is substantial evidence to support the Board's findings. *See Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

At the hearing held before the administrative law judge, witnesses for the Company and the general counsel testified generally that on October 22, 1970, the Company's employees went on strike. The next day representatives of the Company, including attorney Stanford Madden, met with representatives of the union to discuss how to end the strike. The parties spent two days reviewing the personnel records of 26 discharged employees. By the morning of October 25, it had been tentatively agreed that 13 employees would be reinstated. Some time during the morning of October 25, Carl Jones, the Company's president, who had been out of town, returned to the plant and was informed of the negotiations. Without knowing which 13 employees were to be reinstated, Jones told the union representatives that he would agree to their reinstatement. William Greathouse, one of the discriminatees, asked

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[3] Although the administrative law judge and the Board ruled on the merits of this contention, it was held in the alternative that the issue had been fully litigated in the prior unfair labor practice proceeding. Because we decide this contention on the merits, we find it unnecessary to consider the issue preclusion argument. It is doubtful, however, that the issue in question was fully litigated by the parties and passed upon by the Board at the earlier proceedings. *See Brown & Root, Inc.*, 132 N.L.R.B. 486, 492-93 (1961), *enforced as modified*, 311 F.2d 447 (8th Cir. 1963).

whether the reinstated employees would receive back pay. Jones replied that he would never pay back pay and left the meeting. The union committee refused to agree to the Company's proposal, but submitted it to the striking employees who, in turn, rejected it.

It is clear that had the Company's offer of reinstatement been conditioned solely on its refusal to give back pay, as the Company strenuously argues, then the offer of reinstatement would not have been invalidated. *D'Armigene, Inc.* 148 N.L.R.B. 2, 15 (1964), *enforced as modified,* 353 F.2d 406 (2d Cir. 1965); *Reliance-Clay Products,* 105 N.L.R.B. 135 (1953). The administrative law judge and the Board, however, found that the Company had placed several other conditions on the offer of reinstatement which did invalidate it.

The record reveals that the Company called five witnesses who testified in essence that there were no conditions placed on the offer of reinstatement made by Carl Jones on October 25, 1970, or by anyone else during the negotiations.[4] In direct contradiction, however, was the testimony of two witnesses called by the general counsel. For example, Harry Andrew, a former representative for the United Steel Workers of America, and called as a witness by the general counsel, testified that at the beginning of the negotiations on October 23, 1970, Stanford Madden, the Company's attorney, stated to the union negotiating committee that something would have to be done in regard to the pending unfair labor practice charges. Andrew further testified that on October 25, 1970, at approximately the same time Carl Jones made the offer of reinstatement, Madden again stated to the committee that

[4] Although the Company argues that only the words spoken by Jones should be considered as the offer, under the totality of the circumstances we conclude that any conditions previously included by representatives of the Company were implicit in Jones' offer of reinstatement.

something would have to be done with the pending charges.[5] William Greathouse, one of the discriminatees who was also a member of the union negotiating committee and called as a witness by the general counsel, corroborated Andrew's testimony.

The administrative law judge found the testimony of Andrew and Greathouse to be straightforward and consistent. Furthermore, he found that three of the five witnesses called by the Company had made prior statements which were somewhat inconsistent with their testimony.[6] As this court has stated:

> The rule in this Circuit is that "the question of credibility of witnesses and the weight to be given their testimony" in labor cases is primarily one for determination by the trier of facts. This Court is not the place where that question can be resolved, unless it is shocking to our conscience.

NLRB v. *Morrison Cafeteria Co. of Little Rock,* 311 F.2d 534, 538 (8th Cir. 1963) (citations omitted). Although this court has stated in *NLRB* v. *Payless Cashway Lumber Store of South St. Paul, Inc.,* 508 F.2d 24, 28 (8th Cir. 1974), that this rule is not to be applied mechanically so as to compel us to sustain any finding concerning conflicting testimonial evidence, here the record as a whole supports the credibility findings of the administrative law judge and the Board. Accordingly, we refuse to disturb the Board's finding that the Company conditioned its offer

[5] The record further reflects that the union committee reported to the striking employees that part of the offer included dropping the charges pending against the Company.

[6] The administrative law judge noted that one Company witness had testified at a prior hearing that an agreement had been struck to drop the pending charges. At the current hearing the witness recanted and stated that nothing had been said about dropping the charges.

of reinstatement of October 25, 1970, upon the dropping of the unfair labor practice charges.[7] It follows that the back pay period did not terminate on October 25, 1970. *See NLRB* v. *St. Marys Sewer Pipe Co.*, 146 F.2d 995 (3d Cir. 1945); *Denver Fire Reporter and Protective Co.*, 119 N.L.R.B. 1187, 1188 (1957).

The Company secondly contends that the Board erred in finding that certain discriminatees would not have been terminated for economic reasons during the back pay period.[8] It is a well settled principle that the burden of proof is on the employer to show that it would not have had work available for a discriminatee due to factors unrelated to the discriminatory discharge. *NLRB* v. *Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966); *Nabors* v. *NLRB*, 323 F.2d 686, 690 (5th Cir. 1963); *NLRB* v. *Brown & Root, Inc.*, *supra*, 311 F.2d at 454. *See NLRB* v. *Madison Courier, Inc.*, 472 F.2d 1307, 1318 (D.C. Cir. 1972). This principle not only allows the employer the opportunity to show that the otherwise appropriate back pay order would work an undue economic hardship, but also as a practical matter places the burden of going forward on the party having knowledge of the pertinent facts. *NLRB* v. *Mastro Plastics Corp.*, *supra*, 354 F.2d at 176.

Turning to the record before us, it is undisputed that the Company, through a gradual process, experienced an economic reduction from 1970 to 1973. For instance, the

[7] The administrative law judge found that the Company had further conditioned its offer of reinstatement by requiring the termination of the strike, improvement in absenteeism by several employees, the changing of jobs by other employees and the taking of a physical examination by one discriminatee. In light of our discussion above, we do not reach these issues.

[8] The discriminatees included in this contention are William Greathouse, Ronald Greathouse, David Covey, John Ashby, James Forbis, Joseph DeMent, and John Lankford.

Company during this period reduced the number of shifts from three to one. The Company further reduced its overall plant complement from 82 in June 1970 to 38 by the end of 1973. In light of these basically undisputed facts and the Company's contention that all 17 discriminatees would have been terminated at specific intervals in the course of the economic reduction, our inquiry necessarily focuses on the Company's layoff policy. In that regard the Company's plant manager testified that the Company did not follow a strict seniority plan in its layoff policy. Other factors such as ability, work experience, work performance and flexibility were considered. The record further reveals that although some employees were terminated during this period when their specific jobs were eliminated, at least three employees were reassigned to other jobs in the plant. We also note that the Company was advertising for job applicants only a couple of months prior to the discharge of the discriminatees. Thus, even though the Company produced specific evidence concerning the possible termination of each discriminatee for economic reasons, we cannot say that the Board's findings on this issue are not supported by substantial evidence on the record considered as a whole.[9]

The Company finally argues that the Board incorrectly found that certain discriminatees did not willfully incur a loss of earnings.[10] In connection with this issue, the Supreme Court has stated:

[9] The Company also contends that it proved before the administrative law judge that certain discriminatees would have been discharged by the end of 1970 because of their excessive absenteeism. The Board in effect found that the Company did not carry its burden on this issue. Having carefully reviewed the record and considered it as a whole, we cannot say that the Board's finding on this issue is not supported by substantial evidence.

[10] The discriminatees include James Forbis, Joseph De Ment, Ronald Greathouse, David Covey, Marlyn Kimberlin, Elaine Peu-

> Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred.

Phelps Dodge Corp. v. *NLRB,* 313 U.S. 177, 197-98 (1941). The employee must therefore make a reasonable search for interim employment. *NLRB* v. *Arduini Mfg. Corp.,* 394 F.2d 420, 423 (1st Cir. 1968); *NLRB* v. *Miami Coca-Cola Bottling Co.,* 360 F.2d 569, 575 (5th Cir. 1966); *NLRB* v. *Brown & Root, Inc., supra,* 311 F.2d at 452. The burden of proof, however, is on the employer to show the employee's failure to make a reasonable search. *NLRB* v. *Arduini Mfg. Corp., supra,* 394 F.2d at 423; *Florence Printing Co.* v. *NLRB,* 376 F.2d 216, 223 (4th Cir. 1967); *NLRB* v. *Miami Coca-Cola Bottling Co., supra,* 360 F.2d at 575; *NLRB* v. *Brown & Root, Inc., supra,* 311 F.2d at 454.

The Board in effect found that the Company did not meet its burden in proving that the discriminatees willfully incurred a loss of earnings. Although the testimony presents very close questions concerning several of the discriminatees, except for Elaine Peukert, we cannot say that the Board's findings are not supported by substantial evidence on the record considered as a whole.[11]

Ms Peukert testified that from November 6, 1972, to January 22, 1973, she was laid off from her employment at Whitaker Cable. She further testified that she did not

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kert, June Elliott, John Ashby, Kim Woods, Virgie McCannon, Margaret Buckley, and Sharon Meier.

[11] We note that the administrative law judge reduced the back pay of ten discriminatees for numerous reasons.

look for work during the layoff period because she know that she would eventually be recalled. Under these circumstances, since by her own admission she was not in the job market from November 6, 1972, to January 22, 1973, this period must be excluded from the back pay computation.

After carefully considering each of the Company's contentions of error, we order, with the exception of the Peukert back pay award, enforcement of the Board's entire back pay order. The Peukert award is remanded to the Board for further proceedings not inconsistent with this opinion.

Enforced in part. Remanded in part.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[dated December 1, 1975]

Supplemental Decision and Order

On October 8, 1971, the National Labor Relations Board issued its Decision and Order directing that Respondent make whole certain employees for their losses resulting from Respondent's unfair labor practices in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended.[1] On February 20, 1973, the United States Court of Appeals for the Eighth Circuit issued its judgment enforcing the Board's order.[2] Respondent's petition for certiorari to the United States Supreme Court was denied on October 9, 1973.[3] On June 7, 1974, the Regional Director for Region 17 issued a backpay specification and notice of hearing to which Respondent filed an answer and an amended answer. A hearing was held before Administrative Law Judge Julius Cohn on September 10 through 13, and November 11 through 15, 1974, for the purpose of determining the amount of backpay due the discriminatees. On May 20, 1975, the Administrative Law Judge issued the attached Supplemental Decision in which he found that the discriminatees entitled to backpay as set forth in his recommended Order. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and brief and has decided to affirm the rulings,[4] findings, and con-

[1] 193 NLRB 616.

[2] 474 F.2d 1155.

[3] 414 U.S. 823.

[4] Respondent contends that the Administrative Law Judge's action in quashing a subpena to compel production of the Board's Compliance Officer Manual deprived Respondent of due process in its cross-examination of the Compliance Officer. We find no merit in this contention as the Admnistrative Law Judge properly relied on two grounds: (1) Respondent's failure to obtain written consent from the General Counsel for the production of the manual pursuant to Sec. 102.118 of the Rules and Regulations which were in effect at the time of the hearing in the instant backpay proceeding, and (2) the fact that the backpay formulas and rationale herein are spelled out in the record as well as in the Board's past Decisions.

clusions of the Administrative Law Judge and to adopt his recommended Supplemental Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Supplemental Order of the Administrative Law Judge and hereby orders that Respondent, Midwest Hanger Co. and Liberty Engineering Corp., Kansas City, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Supplemental Order.

Dated, Washington, D.C. December 1, 1975.

JOHN H. FANNING, *Member*

HOWARD JENKINS, JR., *Member*

JOHN A. PENELLO, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[dated May 20, 1975]

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SUPPLEMENTAL DECISION

Statement of the Case

JULIUS COHN, Administrative Law Judge: On October 8, 1971, the Board issued its Decision and Order (193 NLRB 616) directing Midwest Hanger Co. and Liberty Engineering Corp., herein called Respondent, to make whole certain employees for their losses resulting from the unfair labor practices found to have been committed by the Respondent. On March 21, 1973, the Board's Decision and Order was enforced by the United States of Appeals for the Eighth Circuit (474 F.2d 1155, 82 LRRM 2693),[1] Respondent's petition for certiorari to the United States Supreme Court was denied on October 9, 1973. (84 LRRM 2421). The parties being unable to agree on the amount of backpay due under the terms of the Board's Order, the Regional Director for Region 17 issued a backpay specification dated June 7, 1974. The Respondent filed an answer and an amended answer thereto.

A hearing was held before me at Kansas City, Missouri, on September 10 through 13, and November 11 through 15, 1974. Briefs, which have been carefully considered, have been received from General Counsel and Respondent.

Upon the entire record in the case and upon my observation of the witness, I make the following:

Findings of Fact

The Board's Order as enforced by the Court provided for reinstatement of 17 employees and directed the Respondent to make them whole for any loss of earnings they may have sustained by reason of its discrimination.[2] In its answer to the backpay specification Respondent contended that it had made a proper offer of reinstatement to certain of the 17 discriminatees on October 25, 1970.[3] At the opening of the hearing herein it was deemed expedient to proceed with the evidence on this issue at the outset. Counsel for the General Counsel then moved to prohibit the testimony on the ground that the question had been fully litigated in the prior unfair labor practice hearing. In addition to his reliance on the Board's Order as enforced by the Court, General Counsel submitted in support of his Motion excerpts from the transcript of the previous hearing, briefs of the parties to the Trial Examiner, the Respondent's exceptions to the Trial Examiner's Decision and the cross exceptions of the General Counsel, and, finally, excerpts from the briefs of the parties to the Court of Appeals.[4] As the prior Decision contained no specific finding with reference to the alleged offer of reinstatement made to some terminated employees, it was not clear that it had been finally resolved. I therefore denied the Motion, made without prior notice, rather than

[1] The Court of Appeals did not enforce that portion of the Board's Order requiring reinstatement and backpay for Betty Johnson and Grover Speck.

[2] The 17 employees are: John Ashby, Kim Bristow (Woods), Margaret Buckley, David Covey, Joseph DeMent, June Eiliott, James Walter Forbis, Ronald Greathouse, William Greathouse, Marilyn Kimberlin, John Charles Lankford, Shirley Lauderdale (Chamberlin), Sharon Meier, Michael Owens, Virgie Peterson (McCannon), Elaine Peukert and John Sells.

[3] As will be seen *infra*, Respondent allegedly offered to reinstate 13 employees of whom 11 are discriminatees in this proceeding. The 11 discriminatees referred to are: John Ashby, Kim Bristow (Woods), Margaret Buckley, David Covey, Joseph DeMent, June Elliott, Ronald Greathouse, William Greathouse, Marilyn Kimberlin, Sharon Meier and Elaine Peukert.

[4] These materials were received in evidence as Board Exhibits 13(a) through (g).

refuse Respondent an opportunity to litigate a matter in these circumstances.

Upon reconsideration of this issue, I shall grant General Counsel's Motion to Strike contained in his brief. I now find, based upon the entire record in this, and the relevant portions of the previous proceedings, that the question of whether Respondent made an unconditional offer to reinstate 11 employees in October 1970 was litigated finally in the course of the original unfair labor practice case. The Trial Examiner's recommended Order provided that Respondent offer to such of the employees named in the complaint, "who have not heretofore been fully reinstated," their former jobs and make them whole for any loss of earnings they may have suffered. Respondent took specific exceptions to what it termed the Trial Examiner's failure to consider the Respondent's offer to reinstate terminated employees on October 25, 1970, in ordering their reinstatement. Counsel for Respondent, who had urged this issue in its brief to the Trial Examiner, reiterated it in a brief submitted to the Board in support of its exceptions to his Decision. The Board, noting that it considered the Trial Examiner's Decision, the exceptions, the cross exceptions, and briefs and the entire record in the case, adopted the recommended Order of the Trial Examiner. In view of these recitals it cannot be presumed that the Board did not consider the issue of the alleged unconditional offer of reinstatement in 1970 particularly as Respondent had taken specific exception on the point. If the 11 discriminatees, to whom the alleged offer had been made, had refused it in 1970, they would not have been entitled to backpay subsequent to the date of the offer. Since the Board directed reinstatement in 1971, which it would not have done if it had found a valid prior offer, the backpay period continued to run under the make whole remedy until Respondent made a valid offer. Respondent urged the same issue in the Court of Appeals but the Court enforced the Board's Order with regard to

the reinstatement and make whole remedy.[5] I conclude, therefore, that the issue had been litigated and decided.

If it should be held that the Board's Order as enforced by the Court in the original case is not conclusive on this issue and there was no final determination as to whether the Respondent had offered reinstatement to some of the discriminatees herein, I would find, nevertheless, on the basis of all the testimony and evidence in the hearing herein that Respondent had not made a valid unconditional offer of reinstatement on October 25, 1970, to 11 of the discriminatees in this matter.

On October 22, 1970, the employees on the second shift walked out and were later joined by the employees on the other two shifts. The following day, a Friday, representatives of the Company and the Union and employees met at the plant. The Company was represented by its attorney, Stanford Madden, Gene Brown, plant manager, and Reginal Ward, vice-president and general manager. For the Union there were Harry Andrew, an International Representative of the United Steelworkers and an employee committee including some of the discriminatees. All of the company representatives present at the meeting as well as Andrew and a number of employee committee members testified at this hearing. There is a substantial agreement that meetings were concluded over the entire weekend in the course of which the parties devoted most of their time to a discussion of the 26 employees who had been terminated by the Company. After it had been established that the Union was seeking by the strike to have these employees reinstated, among other things, the Company resisted such demand contending that it had discharged them for cause. Thereupon the parties reviewed the Company's reasons and inspected the personnel rec-

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[5] Except, as previously noted, for two alleged discriminatees not involved herein.

ords of each of the terminated employees. By Sunday morning, October 25, it was agreed that 13 of the discharged employees would be taken back. There were certain reservations with respect to this agreement which in itself was tentative as it was subject to the approval of the Respondent's president, Carl Jones. Admittedly David Covey would have to submit to a physical examination before he could be reinstated. Joseph DeMent, a welder, would have to take another job, as would John Ashby. Elaine Peukert and Marilyn Kimberlin would have to improve their absenteeism, and June Elliott, her attitude. The Union agreed to speak to the various people who would be returned to work to urge them to improve their absenteeism records, attitude and general performance. The Company contends that these considerations were part of the discussions and not conditions attached to its agreement to take certain people back to work.

Carl Jones, company president, had been out of town during this time on business. He returned on Sunday morning, October 25 while the parties were still engaged in their discussions. He sat and listened for about half an hour and then a recess was taken. Jones met with the other representatives who briefed him on what had occurred. He quickly decided that he would make one effort to resolve the strike. He said that he told his people if they had already agreed to take 13 employees back, (he did not even know who they were) that he would tell the Union that they would be reinstated immediately. The meeting was then reconvened and Jones said that in order to resolve the strike he would reinstate the 13 employees agreed upon, he would recognize the Union and bargain with it in an effort to reach an agreement. At this point an employee member of the committee, presumably Bill Greathouse, asked whether backpay was included for the returning terminated employees. Jones refused stating that it was out of the question. After a number of recesses during which the union representatives went out to con-

sult with the strikers, and after a later meeting with a larger group of strikers, the offer was turned down because the employees felt that the 13 should receive backpay.

While there is not much dispute that the above recital constitutes an account of what occurred at the weekend meetings, there is a sharp conflict as to one other matter which at some point was the subject of some discussion at the meetings. This is with respect to the pending unfair labor practices charges. By this time, the Regional Office of the Board had already issued a complaint alleging that the Company had violated Section 8(a)(1), (3) and (5) of the Act and, among other things, the complaint listed the 26 alleged discriminatees discussed at the meetings. The issue is whether the Company's offer to reinstate 13 employees was conditioned upon withdrawal of the unfair labor practice charges. Jones who had been present only at the final meeting on Sunday said that while he did not discuss it, he assumed that if he put all the people back to work the Union would withdraw their charges. Plan Manager Brown testified that nothing was said about unfair labor practices at the time Jones made his offer. Brown further said that he does not recall when or by whom, but at some point the matter of the pending unfair labor practices had been brought up and Attorney Madden had pointed out that this had to be resolved by the Labor Board. At the prior hearing, Brown had testified that he knew about the charges but did not recall any discussions that they be dropped.[6]

Vice-President Ward testified that he could only recall the question of the unfair labor practices mentioned once when someone brought it up to Mr. Madden who replied that the NLRB would have to handle the whole thing. Ward stated that nothing had been said about the dropping of

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[6] Excerpts from the transcript of the previous unfair labor practice hearing were received and made part of the record herein.

the charges. This is in contrast with Ward's testimony at the previous hearing where, in response to a question about the pending unfair labor practice charges, he said, "Everything was agreed to be dropped if we took the people back in full standing." And later he reiterated, "All charges were to be dropped." Ward now states that he misunderstood the question asked him in the original hearing and his testimony now is that nothing was agreed about dropping any charges.

Stanford Madden, the attorney, testified that upon being informed of the strike on October 22, 1970, he called Union Representative Andrew and made arrangements for the meetings commencing that Friday. Madden stated that the pending charges were not important because the main objective of the Company was to get the plant back to work. Madden said that at the Sunday meeting in the presence of Jones, he "might have raised the question of the unfair labor practices . . ." and Andrew replied that the Union could withdraw them. Madden said he told Andrew that he could not withdraw the charges but that he could request withdrawal of the Board. Madden stated that this discussion occurred right after Jones made his offer but before the matter of the backpay was brought up. Madden did not believe that he discussed with Mr. Jones the problem of the Board's handling of the backpay situation before Jones made his offer. He does say, however, that he generally informed Mr. Jones about the consequences of the Board's finding of 8(a)(3) violations. Finally he averred that Jones' offer was not conditioned upon withdrawal of the charges. Thereafter Madden was recalled as a rebuttal witness and he denied making a statement at the outset of negotiations on Friday that the charges would have to be taken care of. In any event he said he did not know that they could settle the whole matter because all the Union could do was to request withdrawal of the charges. In this connection he said that his

experience taught him that if a settlement was reached the Board would likely honor a withdrawal request.

Jewell D. Ware who was called as a witness on behalf of the Respondent, also testified with respect to this issue. Ware is an employee who is presently chairman of the Union but was then a member of the employee committee. Ware said that after Jones made his offer that Sunday morning he heard someone from the Company say that they had some charges against them to which Andrew replied that he had noticed. He testified that either Jones or Ward said or asked if these charges could be dropped and that Madden said that it was in the hands of the NLRB. Ware stated that it was right after Jones made his offer that Ward mentioned the charges and Madden said he did not believe that it was possible to drop them without the NLRB and that nothing further was said on that subject. In a written statement dated November 28, 1973, Ware had said that Jones stated that he would bargain with the Union if the employees would agree to drop their charges.[7]

Harry Andrew, now retired, but then the representative of the Union, testified that Madden called him on Thursday night and requested that he meet with the Company on Friday in an effort to settle the strike. At the meeting Madden asked what it would take to solve the strike and Andrew said that 26 people were terminated unjustly and they wanted to get them back to work. Madden replied that the circumstances were delicate and that something would have to be done with the pending charges to which

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[7] Ware explains this apparent discrepancy between the affidavit and his present testimony by saying that he gave the affidavit 3 years after the events had occurred and he was not quite sure about it and had not been thinking about it for a long time. However, he testified that now having sat in on the present hearing and listened to the "discussions," what actually happened came back to him more clearly.

Andrew rejoined that if something could be resolved the charges could be dropped. Madden said that if anything was worked out they would have to be dropped, meaning the charges. Andrew said that the matter of dropping the charges was again brought up on Sunday after the recess in which Jones had been briefed and prior to the Jones' offer. Andrew testified that the Company was offering a package deal: reinstate 13 of the terminated employees and leave out 13, recognize the Union, bargain for a contract, no backpay for the reinstated employees, and finally dropping the unfair labor practice charges. When the employees' committee turned down the offer of Jones because of his refusal to include backpay, at the request of the company representatives, they met with the employees on the picket line who also rejected the offer. Thereafter a meeting was held on the parking lot attended by approximately 60 or 70 employees and again the offer was turned down.

Andrew insisted that Madden brought up this question of the charges, not only at the outset of the negotiations on Friday, but also just before or just after Jones made his offer. Andrew said that he knew that charges could not be dropped automatically but he felt that he could get it done by going to the Board and requesting it.

William Greathouse, one of the discriminatees, was also a member of the employees' committee. He testified that at the first meeting on Friday Madden asked what their purpose was and Andrew said that the Union wanted recognition and reinstatement of the 26 people who had been terminated. Madden then asked if the problem could be resolved, would the charges pending at the NLRB be withdrawn, and Andrew said that if they could get an agreement he felt that he could withdraw the charges. The matter was brought up again on Sunday when Jones made his offer and Madden asked Andrew if he would withdraw the charges if everything was agreed upon to which Andrew replied that he would. Greathouse said that he thought this matter was settled and then he brought up the question of the backpay.

Upon analysis of all the testimony with respect to this issue of whether the Company's offer to reinstate 13 employees was in part, conditioned upon withdrawal of the pending unfair labor practices, I credit the testimony of Andrew and Greathouse and find that I cannot credit the testimony of the Respondent's witnesses. At least Brown, Ward, and Ware had made prior inconsistent statements. Brown testified at this hearing that at some point Madden pointed out that the pending charges would have to be resolved by the Labor Board, but testified at the prior hearing that he did not recall any discussion that they be dropped. On the other hand, Ward had testified at the prior hearing that everything was agreed to be dropped (referring to the pending charges). At the current hearing Ward recanted and stated nothing had been said about dropping the charges but that Madden merely had pointed out that the NLRB would handle the whole thing. Ware, who in writing said that a company representative had stated he would bargain with the Union if the employees would agree to drop their charges, now testified at the hearing that this had not occurred and that his memory was better after listening to the testimony of the Company's witnesses who preceded him on the stand.

Madden's testimony, in effect, relies on the technicality of the necessity for a Regional Director to approve withdrawal of the charges and that therefore it was not possible to condition reinstatement or any other agreement reached by the parties upon withdrawal of the charges. But Madden, a labor attorney of 30 years' experience and himself a former field attorney with the Kansas City Regional Office of the Board knew better. He finally testified that his experience told him that if a settlement was

reached the Board would likely honor a withdrawal request.

On the other hand the testimony of Andrew and Greathouse was straightforward and consistent on this issue. I find, therefore, that any offer of reinstatement made on October 25, 1970, was conditioned upon withdrawal of the unfair labor practice charges.

An employee who has been discriminatorily discharged is entitled to an unconditional offer of reinstatement to his former position. Offering to reinstate such an employee provided that he drops pending unfair labor practices clearly attaches a condition to the offer. The Board has long held that attaching such a condition to a offer of reinstatement is not valid.[8] Any other result appears to me to be implausible. A factor that was crystal clear from this record is that President Jones was adamant with respect to the payment of backpay to these discriminatees. Not only did he view this as a matter of principle, but he also stated that the Company did not at that time have the financial resources to make such payments. In these circumstances I do not believe that a businessman of his acuity would leave himself open to a backpay liability which could have resulted from the continued processing of the unfair labor practice complaint. If Respondent were making an offer of reinstatement to curtail its backpay liability and litigate the case, that should have been made clear to the Union and the employees. Instead Jones told them he would never pay backpay. If this creates an ambiguous situation, the interpretation must be resolved against Respondent because the offer must be clear and specific to be valid. Finally, it is unlikely that parties agree upon recognition and bargaining without seeking withdrawal of charges alleging the Company's refusal to bargain in good faith.

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[8] *Denver Fire Reporter and Protective Company, Inc.*, 119 NLRB 1187; *Interior Enterprises, Inc.*, 125 NLRB 1289, 1312.

Moreover, there are other factors which negate a finding that Respondent's offer was unconditional. For example, witnesses for the Respondent admit that discriminatee David Covey would have had to undergo a physical before returning to work. This is obviously a condition to his reinstatement and as to David Covey, at the very least, Respondent's offer was not valid. At least two other employees, DeMent and Ashby, were to return to different jobs, Respondent having contended that their jobs had been eliminated. Yet there is testimony in this record to the effect that other people were doing the work in their place. Also Buckley, Peukert and Kimberlin had to improve their absenteeism. Respondent contends that these matters were merely the subject of the discussion in determining which employees it would agree to reinstate. But if so, the entire context was one of limitation and condition and before agreement it was clear that these people would have to improve either absenteeism or conduct or work habits, or, in the case of Ashby and DeMent, the assumption of different positions. In these circumstances the discriminatees were not receiving "a specific and unequivocal offer" to which they were entitled.[9] Respondent further argues that none of these conditions were attached to Jones' offer when he made it. While this indeed true, Jones himself said that he did not even know the names of the 13 people to whom he was offering reinstatement. He relied on his managers who had conducted these meetings for almost 3 days and who informed him that they agreed with the Union to take back 13 of the terminated employees. Having relied on these people to fill in the names of the 13 to be reinstated, he is also bound by any commitments they made or conditions they may have placed upon the reinstatements during the discussions with the union representatives and the employee committee.

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[9] See *Rea Trucking*, 176 NLRB 520 (1969).

Finally I find that the offer to reinstate 13 employees was conditioned upon the termination of the strike. This was implicit during the entire negotiation. The motivating factor in commencing the negotiations was the desire of company officials in getting the plant back to work. Madden testified that the operation had been shut down and the Company was interested in finding some way to get the strike over with. Madden testified at one point that no conditions were placed on Jones' offer of reinstatement, but immediately he interrupted and stated that he wanted to "back up" on that statement and went on to say as follows: "There was a condition on that statement and went on to say as follows: "There was a condition on that they would all come back to work." Ware, the employee committeeman, testifying at the behest of the Company, said "It was my understanding that he wanted the strike settled and that he would bring these people back if it would settle the strike. . . ." Jones said that he was interested in getting the thing over with and accordingly resolved to break through and made the offer which he did make. In these circumstances, it is not conceivable that he would have accepted the return of 13 employees while the strike continued.

What emerges from this entire discussion is that the parties had agreed on a package deal. Thirteen terminated employees would be reinstated, the Company would recognize and bargain with the Union, the strike would be concluded, certain reinstated employees would have to take different jobs, others would have to improve their records either with regard to absenteeism, work habits or other conduct, and the unfair labor practice charges would be withdrawn. This does not add up to the unconditional offer of reinstatement to which discriminatorily discharged employees are entitled.

For all of the above reasons, I find that, even if the issue had not been finally litigated, Respondent did not make

a valid unconditional offer of reinstatement to 11 of the discriminatees herein on October 25, 1970.

II. The Method of Computation

In computing the total gross backpay due to each of the discriminatees, the Regional Office employed a formula which utilizes a group of representative employees. This method has been frequently employed in situations where the backpay period is lengthy and it may be difficult to determine the probable path of a particular discriminatee during the period. A group of representative employees were selected who worked in similar classifications and earned similar wages at the time of the discharges. The Compliance Office divided the representative employees into three groups to match corresponding groups of discriminatees. He then ascertained the quarterly earnings of each representative employee throughout the backpay period and arrived at an average earnings figure for each of the three representative groups. These amounts were assigned as the gross quarterly earnings for every discriminatee in the corresponding group. As earning figures were used, factors such as overtime and absenteeism are automatically reflected.[10]

With respect to the latter, quarters in which representative employees had excessive absences (determined at over 5 days for this purpose) were excluded from the computa-

[10] It is customary, according to Compliance Officer Rooney, to use hours worked, rather than earnings, as a basis for the computation. However, Rooney said Respondent informed him that the hourly records were in dead storage and not readily available. In its brief, Respondent criticizes Rooney's use of the quarterly earnings method, implying perhaps that he should have forced Respondent to produce the hourly records it failed to submit voluntarily. Rooney testified with great forthrightness and candor, and I do not doubt that he asked for the hourly records. In any event, there is nothing inherently wrong with his use of the quarterly earnings and I reject Respondent's contention in that regard.

tion. This information was gleaned from personnel records. In this manner, normal or average amounts of absenteeism were built into the computation. And, similarly the factor of overtime was included.[11] Wage increases are, of course, reflected by the quarterly earnings of the representative employees.

Respondent has proposed, in lieu of the formula used in the specification, a method of computation on an individual basis extending the employment of each discriminatee through the backpay period. This involved using the hourly wage rate of each discriminatee, cranking in increases according to the periodic changes in the Company's wage schedules. It was assumed that the discriminatee worked a 40-hour week during the entire backpay period to which is added an adjustment for overtime. For discriminatees employed by Liberty Engineering,[12] the total amount of overtime hours each worked during his employment was determined. This was divided by the number of weeks he was employed for a weekly average and multiplied by 13 to obtain a quarterly average. This factor was then added to the total regular hours each discriminatee would work in a quarter and the gross backpay is calculated by using the wage rate then in effect for the job classification.

To ascertain overtime for the other discriminatees (Midwest employees) Respondent used a control group consisting of all employees on the payroll in November 1973 and, working back to the discharge dates, computed the average quarterly overtime worked by the group (in each of the years they were employed), and assigned that amount quarterly to each discriminatee.

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[11] The problems of the excessive absenteeism of discriminatees prior to discharge or representative employees with large amounts of overtime will be dealt with under separate headings.

[12] Lankford, DeMent, Sales, and Owens.

In appendix 18 of its Amended Answer, Respondent employing its formula, has set forth a gross backpay figure for each discriminatee on that basis. In so doing, it assumed that five discriminatees[13] would have been demoted to general labor for economic reasons. Respondent's formula contains no provision for absenteeism, although it vigorously contends that the formula used in the specification does not account for the excessive absenteeism of some of the discriminatees during their employment. In another calculation submitted in its Amended Answer, proposed for the shorter backpay period of approximately 6 months in the event it was held that Respondent had made a valid offer of reinstatement, Respondent built in a factor for historical absenteeism. Except for its argument about the absenteeism of some discriminatees, absence is not otherwise considered in Respondent's proposed formula for the longer period.

A discriminatee is entitled to receive what he would have earned had he remained in the Company's employ less his interim earnings. This is a broad principle not simple in its application. There is no formula that could measure an exact figure since the discriminatees did not actually work during the period. Therefore "the Board is vested with a wide discretion in devising procedures and methods which will effectuate the purposes of the Act." *NLRB* v. *Brown & Root, Inc.*, 311 F.2d 447, 452. The formula utilized by the General Counsel, a representative group whose earnings are averaged through the backpay has been often approved by the Board.[14] I find that its employment in this case is reasonable and proper.[15] While the formula pro-

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[13] W. Greathouse, R. Greathouse, Covey, Forbis and Ashby.

[14] See *Ambrose Distributing Co.*, 178 NLRB 721 (1969); *J. H. Rutter-Rex Manufacturing Co.*, 158 NLRB 1414 (1966).

[15] Most discriminatees were terminated in mid-June 1970. As there were only approximately 2 weeks remaining in that quarter, gross backpay for the second quarter of 1970 was computed for

posed by Respondent has produced similar gross backpay figures for many of the discriminatees, as previously noted it makes no provision for absenteeism, normal or excessive, and while arguing against the representative group concept, Respondent actually employs the idea (calling it a control group) in its computation of overtime for the Midwest discriminatees.

Having approved the use of the representative group theory of computation,[16] I do not intend to apply it slavishly without regard to inequities arising from special circumstances respecting groups or specific discriminatees. As they have been divided into three groups, I shall examine each separately regarding the applicability of the formula.

A. Group 1

There are eight discriminatees in this group all of whom are in the general labor classification.[17] The average earning of six representative employees all in similar classifications and having similar wage rates as the discriminatees, were assigned to this group. Respondent objected to the inclusion of Leona Munkirs as a representative employee because she was a "Red Star" employee at a rate of $2.50 per hour. Since the average hourly rate of the representative group was $2 and the discriminatees averaged $2.01 her higher rate did not unbalance the

each discriminatee on the basis of a 40-hour week at the hourly rate as of the date of discharge.

[16] In its brief, Respondent contended it was denied due process by reason of the quashing of a subpoena compelling production of the "Compliance Officer Manual." Respondent relied on *McClain Industries, Inc. v. N.L.R.B.*, 87 LRRM 2207 (E.D. Mich., 1974). That case was reversed by the Court of Appeals for the Sixth Circuit. 88 LRRM 2071.

[17] Bristow, Buckley, Elliott, R Greathouse, Kimberlin, Lauderdale, Meier, and Peterson.

group. Its effect was just the opposite, as it served to bring the rates of the two groups to an almost exact balance. The application of the representative formula to this group has achieved the desired effect, noting the similarity of job classifications, the almost identical average wage rate, and the built in factors of wage increases, normal overtime and absenteeism. I therefore approve and adopt it for Group 1 employees.

B. Group 2

This group of six discriminatees[18] of somewhat higher skills had an average wage rate of $2.57 per hour at the time of discharge. The representative employee chosen for Group 2 was Jewell Hawker, Sr., a lift truck operator who earned $2.50 per hour at the time. For the same reasons set forth above, generally, and also with regard to Group 1, I find that the application of the representative employee formula used by the General Counsel to determine gross backpay of this Group is both fair and reasonable. The gross earning figures shall be subject, of course, to specific defenses raised by Respondent with respect to certain discriminatees.

C. Group 3

This group consists o fonly two discriminatees, DeMent, a maintenance welder and Lankford, a maintenance man, whose rates at the time of discharge were $3.25 and $3.75 respectively. The representative employee selected for this group was Lloyd Admire, a maintenance man whose hourly wage at the same time was $3.75 per hour. Respondent vigorously opposes the use of the representative employee formula with respect to this group. I find merit in its contentions. Since the representative group here is not a group, but only one employee, it is manifestly unfair to apply Admire's wage rate of $3.75 to DeMent who only earned

[18] Ashby, Covey, Forbis, W. Greathouse, Peukert, and Owens.

$3.25 at the time of his discharge. Although DeMent would have been entitled shortly to an increase to $3.50, the difference in rates over the whole lengthy period would result in a considerable windfall to him. The balancing argument advanced by the General Counsel when it included Munkirs as a representative in Group 1, is not available here.

The choice of Admire was not wise for another reason, as he was not truly representative. Apparently he was a sort of special category employee who had been employed over a long period of time and, while recently he had been performing a great variety of maintenance tasks, he was also experienced with the production end of the business at Midwest. (All three were Liberty Engineering employees). Thus he would frequently work at Midwest on weekends doing production work. As a result of his utilization at Midwest [19] and his versatility as a maintenance man, Admire compiled an inordinate amount of overtime during the backpay period. On the other hand, Respondent's Comptroller testified that overtime at Liberty was almost nonexistent in 1970, 1971 and 1972. To credit Lankford with the earnings of Admire, in these circumstances, is clearly inequitable, even though their wage rates were the same. Since it is clear that Admire is not really a representative employee for this group, and no other employee has been presented as such, I shall reject the use of the representative employee theory for Group 3.[20]

The only alternative method of computation on the basis of the record herein is that proposed by Respondent, which I shall adopt subject to a slight modification. Using the wage scales for Liberty employees, applicable to DeMent

[19] He was on the Midwest payroll for a portion of the period.

[20] The total gross pay, including overtime and absenteeism, of Admire for the entire backpay period was $36,412. The specification assigns that amount to both Lankford and DeMent.

and Lankford, and extending their employment throughout the backpay period on the basis of full 40-hour weeks for each quarter, I find total gross backpay for Lankford to be $28,834 and DeMent $26,785.[21]

III. Contentions Applicable to More Than One Claimant

A. That Discriminatees would have been Discharged for Economic Reasons

Respondent contends that had the discriminatees continued in its employ, a number of them would have been terminated for economic reasons, such as reductions in force or job elimination, long before the end of the backpay period. It is well settled that such a contention is an affirmative defense and the burden is on Respondent to establish that discriminatees would not have remained in

[21] These figures are broken down by quarters as appears in the Appendix annexed hereto, after adjustments made *infra*. The evidence in the record as to overtime is the Comptroller's uncontradicted testimony that, apart from Admire, Liberty employees did not work overtime up to 1973. In its own calculation, nevertheless, Respondent credited DeMent with 6.5 hours of overtime each month which was the average of his overtime during the 2 months of employment. Although the amount of overtime he would have worked but for his discharge is speculative, I shall not deprive DeMent of the overtime conceded to him in Respondent's computation. There is no evidence concerning overtime for Lankford save the Comptroller's statement as to the lack of it for Liberty employees generally, and the fact that he had no overtime during his employment of one month. Therefore I have not credited him with any. In its amended answer, Respondent sets forth total gross pay figures for Lankford at $28,301 and Dement at $25,375, which include overtime for DeMent but not absenteeism. These are totals and there is no quarterly breakdown, nor are the wage rate scales submitted for Liberty employees precise in describing classifications. My own computation was made by quarters. In any event, the difference is not great, and as the Court said in *N.L.R.B. v. Rice Lake Creamery Co.*, 365 F.2d 88, 89 (C.A.D.C.) 1966: "The approximation thus reached is permissible in view of the impossibility of exactitude." I shall discuss absenteeism *infra*.

its employ for such nondiscriminatory reasons.[22] Statistical probability is not enough and it must be determined what would have occurred regarding the employment of each of the claimants based upon the policies of Respondent. Respondent must make the showing and mere conclusions are not sufficient.[23]

Plant Manager Ward testified that employment dropped from 82 in June 1970, to 52 in January 1971, and then leveled off followed by a gradual decline to about 38 at the end of 1973. Shifts have decreased from three in 1969 to one at present. These changes were attributed to new and improved machinery and maintenance.

1. William and Ronald Greathouse

The Greathouse brothers were employed in May 1970 as operators of a trouser guard machine, at a time when these machines were operated for three shifts. In January 1971, two shifts on the trouser guard were eliminated, and an employee (DeShazer), hired after the discharge of the Greathouse brothers to work on that machine, was terminated. Respondent contends that the Greathouses would have been terminated at that time because of the shift cutbacks plus the fact that five other employees who operated trouser guard machines were their senior. The trouser guard was operated for several months on one shift and then was not used for 5 or 6 months. Thereafter operations were resumed on a one shift basis except for such special occasions as receipt of a large order. The other trouser guard operators were transferred to other jobs in the plant.

In asserting that the Greathouses would have been terminated in January 1971 Respondent apparently relies on

[22] *N.L.R.B. v. Mastro Plastics Corp.*, 354 F.2d 170 (C.A. 2, 1965).

[23] *W. C. Nabors Company*, 134 NLRB 1078, 1088 (1961).

their lack of seniority. Yet Brown testified that there was no strict policy of layoff in order of seniority; that other factors such as ability, experience, flexibility, performance and absenteeism were considered.[24] The fact that DeShazer, a subsequent hire, was terminated in January 1971, does not lead inescapably to the conclusion that the Greathouses would have met the same fate. Five other trouser guard operators were retained in that or other positions. Why not the Greathouses? Most of the work was relatively unskilled and there is no showing that they were not adaptable. In view of all the circumstances, I find that Respondent had not met its burden of showing specifically that Ronald and William Greathouse would have been terminated in January 1971.[25]

2. David Covey

Covey was a wire hanger adjuster on the third shift. After his discharge, another employee, Abels was hired to work the third shift. In January 1971, the second shift was eliminated, but Abels continued to work the third shift. He was terminated in July 1971 due to a reduction in force. As Abels' place on the third shift was taken by a more experienced employee, Respondent argues that Covey would have been likewise terminated. Again, Respondent apparently relies on seniority despite the testimony of its officials that this has not been the sole criterion. Indeed, why was Abels retained in January 1971 when the second shift was eliminated? I find, as with the Greathouses, that an assumption that David Covey would have

[24] The same seniority argument was rejected by the Trial Examiner in the unfair labor practice case who found that President Jones had testified to similar effect. (193 NLRB at page 625).

[25] Respondent's last ditch contention that the Greathouses would have been reduced in any event to a lower clasification with a pay cut, (based on testimony relevant to other employees), not only lacks specificity, but is sheer speculation.

been terminated in July 1971, or even demoted, is speculative, and Respondent has not sustained its burden of proof in that regard.

3. John Ashby and James W. Forbis

Ashby and Forbis were employed in May 1970 as adjusters in the strut hanger department. According to Plant Manager Brown, these jobs were created at that time in an effort to improve efficiency by having employees who were capable of adjusting the machines, present full-time. Brown said that as this result was not obtained, the attempt was a waste. Consequently the jobs were not filled after Ashby and Forbis were discharged and Brown stated that they would have been terminated, in any event, in a few weeks. However, contrary to the contention of Respondent that they were not replaced, the then Trial Examiner Peterson at page 622 of his Decision found as follows: "When Ashby and James Walter Forbis, another adjuster, were discharged, the Respondent hired two new employees to perform that work and gave them a classification of 'general' employees. So far as it appears, there was no alteration in the job duties." As to the alternate contention, that Ashby and Forbis would have been demoted, this is speculative. I note there is testimony to the effect that they were somewhat skilled employees and, in addition, performed other duties. Other than the mere conclusion, there is no specific evidence from which it can be determined that they would have been demoted. I find therefore, Respondent's contentions that Ashby and Forbis would have been terminated or demoted had they not been discharged, to be unpersuasive.

4. Joseph DeMent and John C. Lankford

DeMent had been hired as a welder and Lankford as a machinist. According to Brown, the Company had been subcontracting welding and machine work even prior to

their employment, and, since this activity increased, DeMent would have been terminated "a few weeks" and Lankford "very shortly" after their discharges in June 1970.

Again, this contention will not wash as I find the testimony of Respondent's witnesses to be self-serving and conclusionary.[26] Even taken at face value, it appears that both discriminatees were hired at a time when allegedly Respondent was subcontracting this work. It strains credulity that they would have been hired and terminated so shortly thereafter because of a sudden increase in subcontracting their work. Just to discuss this matter involves a degree of relitigation as the defense of lack of work was found wanting in the unfair labor practice case. Respondent has not presented sufficient probative evidence, that DeMent and Lankford would have been terminated for economic reasons within a few weeks after their discharge.

B. Absenteeism

Respondent argues that certain discriminatees had such records of absenteeism during their employment as would warrent the conclusion that they would have been terminated for that reason by the end of 1970.[27] Respondent has hypothetically extended their absences at the same rate through the balance of 1970 and concludes that absence record of each of these discriminatees would have reached such proportions that they would have been terminated in accordance with established company policy. Once more, there is the question of relitigation, as the defense of absenteeism was raised in the original case and rejected. It is true, as Respondent contends, that the Board's finding that they were discharged for union activity rather

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[26] See *W. C. Nabors Company, supra.*

[27] The discriminatees referred to are: McCannon, Buckley, Forbis, DeMent, Bristow, Peukert, Elliott, Kimberlin and Meier.

than absenteeism does not negate the fact that the discriminatees had records of absences. Nevertheless, the policy of Respondent with regard to the subject of absence was litigated, and it does not appear that there was any definite policy, at least one of which employees were aware. The only rule was that absence for 3 days without calling in meant automatic termination. While Brown testified that periodic reviews were made, and that some employees were later terminated for absenteeism, no objective criteria are set forth nor were employees told of any. The vice of projecting prior absences into the future lies in its speculative nature and involves subjective matters and variables which cannot be predicted to reoccur in precisely the same manner.[28] This type of guesswork is clearly insufficient to sustain the burden of Respondent in proving that these discriminatees would have been discharged in 1970, thereby curtailing the backpay period.[29]

C. Turnover

Respondent contends that because of its high turnover rate, many of the discriminatees would not have remained for a period of 3½ years but would have left, voluntarily, perhaps within 6 months. This is sheer conjecture which I categorically reject. To say the least, this is another "uncertainty" which must be resolved against the Respondent.

IV. The Individual Claims

A. Preliminary

There are a number of controlling principles applied by the Board and the Courts in backpay cases respecting the

[28] See *Atlantic Marine Inc.*, 211 NLRB No. 42 (1974), with regard to overtime.

[29] This discussion of absenteeism is confined to whether the discriminatees would have been discharged for that reason. I shall discuss absenteeism as a factor in DeMent's computation *infra*.

efforts of an individual claimant to seek work, his interim earnings and expenses incurred. It is well established that willful loss of earnings is an affirmative defense, and the burden has been described by the Court of Appeals for the Eighth Circuit as follows:

> . . . in a backpay proceeding the burden is upon the General Counsel to show the gross amounts of backpay due. When that has been done, however, the burden is upon the employer to establish facts which would negate the existence of liability to a given employee or which would mitigate that liability.[30]

It follows that the failure of a discriminatee to make a reasonable search for employment constitutes an affirmative defense.[31] An employer must prove that losses were "willfully incurred" and a "clearly unjustifiable refusal to take desirable new employment."[32] An employee must make a diligent or reasonable search for interim work.[33] In evaluating whether an employer has sustained his burden "any uncertainty is resolved against the wrongdoer whose conduct made uncertainty possible."[34] Other applicable principles will appear in connection with contentions made by Respondent as to specific claimants.

Representatives of six companies in the Kansas City, North Kansas City, and Liberty areas testified on behalf of Respondent as to the availability of work at their plants. In substances they stated that their companies employ

[30] *N.L.R.B. v. Brown & Root, Inc., supra,* at 454.

[31] *Marlene Industries Corporation v. N.L.R.B.,* 440 F.2d 673, 674 (C.A. 6, 1971).

[32] *Phelps-Dodge Corp. v. N.L.R.B.,* 313 U.S. 177, 198 (1941).

[33] *N.L.R.B. v. Arduini Mfg. Co.,* 394 F.2d 420, 423 (C.A. 1, 1968).

[34] *N.L.R.B. v. Miami Coca-Cola Bottling Co.,* 360 F.2d 569 (C.A. 5, 1966).

people in general categories, both male and female, and some also employed persons in skilled positions such as welders and machinists. All testified to considerable turnover, particularly in general labor jobs, and they obtained applicants through referrals from Missouri State Employment Service, newspaper advertisements, and walk-ins. Most of the companies took written applications and hiring was done on an as needed basis, frequently the job going to the person who applied at the time. Many of the discriminatees testified they applied for work unsuccessfully at two of these companies, Guy's Potato Chips and Armo Steel. None of these witnesses testified that any of the claimants herein refused an offer of employment, nor did they represent that if any one of them had applied they would have hired him. Nor did the officials of Guys' Potato Chinps and Armco Steel state why they had not hired the discriminatees who testified they had applied for work at those companies. As stated by Judge Schneider regarding similar circumstances in a recent decision affirmed by the Board: "In this context their testimony to the effect that they hired X number of employees during the backpay period is thus of no effect whatever with respect to the issue of whether Milton would have secured employment had he applied." *Firestone Synthetic Fiber and Textile Company, Division of the Firestone Tire and Rubber Company,* 207 NLRB No. 139 (1973)).

To similar effect is Respondent's testimony concerning newspaper advertisements, many of which were introduced in this record, purporting to show job availability during the backpay period. The test, as above noted, is whether each claimant made diligent and reasonable search for employment or whether he incurred willful losses.

B. The Claimants

1. John Sells and Michael Owens

The parties stipulated to the correctness of the backpay computations respecting these two claimants as contained

in the specification as modified by Joint Exhibit No. 1. Although Respondent did not waive its defenses concerning appropriateness of the formulas or other affirmative defenses raised in its Amended Answer, I have found no merit to any of these defenses in any application to Sells and Owens. I find therefore that they are entitled to the gross backpay less interim earnings and expenses as set forth in the Appendix annexed hereto.

2. John Ashby

Ashby, who was discharged on June 16, 1970, testified that he then went to Kansas City to look for work at trucking companies, of which he could name four. He did not own a car but was driven in by David Covey, another discriminatee, or his brother-in-law. Ashby looked for dockwork rather than truck driving at these companies as his own drivers license had been suspended in 1969 for 5 years because he had been driving while drunk. In the course of these trips he filed applications at several places, going to trucking companies and plants that he knew about. Ashby had no telephone, did not take a newspaper, nor did he visit the state employment service or any employment agency because he had been promised work by Luman Offutt Farms and Lowell Handley. In the summer of 1970 he was employed by Luman Offutt Farms hauling silage on the farm. When the picking season was over and the hauling on the farm completed, Offutt had no work for Ashby as he was precluded from hauling the corn over the road to town. In the fall he obtained work with Lowell Handley, a contractor engaged in grading work on farms, for whom Ashby operated a bulldozer on farm property, but he could not haul equipment over the road. Both Offutt and Handley paid Ashby $2 per hour for this work.

Ashby continued in this work pattern throughout the backpay period. He said he looked for other work during the slack intervals and would have taken any job that was

steady and paid more than what he was receiving from his employer. In reporting wage and employment information to the Regional Office, both Offutt and Handley indicated that there were several occasions on which Ashby failed to show up for duty. Ashby asserted that these occurred at times when Offutt wanted him to haul corn over the road to town, or Handley directed him to move equipment on the road from one farm site to another.

On the basis of these employers' reports, Ashby's failure to register at the state employment service or other agencies, and his alleged inadequate search for work, Respondent contends that it should be absolved from backpay liability for all periods that Ashby was unemployed. I do not agree. As to those occasions which Offutt or Handley have stated that Ashby quit or did not want to work, the Compliance Officer made allowances in the specification. He determined the time Ashby would have worked, had he not quit, and reduced it to a fraction of the particular quarter. The fraction was then applied to a previous quarter with that employer in which Ashby had representative earnings. The product was used as potentialized earnings and added to the interim earnings for that quarter in which the defection occurred or into the next quarter. These absences could have been only for short periods, because the work was seasonal, particularly on the farm, and Ashby testified that he visited trucking and other companies in the Kansas City area during the intervals seeking work. Nor was his failure to register at the state employment service in itself disqualifying, as urged by Respondent, absent evidence that such registration would have produced actual or potential employment.[35]

I find that Respondent had not adduced evidence sufficient to establish that Ashby sustained willful losses of earnings other than as provided for as potential earnings in the specification, and, that at other times, he made rea-

[35] *Southern Household Products Company, Inc.*, 203 NLRB 881 (1973).

sonable efforts to seek employment. However I find that the W-2 tax form showing earnings from Handley in 1973 in the sum of $653 is a more reliable document than the Board's form letter submitted by Handley which lists earnings for 1973 which total $511.50. Accordingly, I shall reduce the net backpay in the fourth quarter of 1973 by that amount. Total net backpay of John Ashby is thus found to be $13,710 as set forth by quarters in the Appendix.

3. Kim Bistow Woods

The backpay period for Woods begins July 1, 1970, and ends November 26, 1973. At the hearing amendments were made to the specification regarding additional interim earnings and expenses so that the net backpay claimed to be due is $12,723.

After her discharge Woods sought employment by responding to advertisements and visiting companies in the area. She also registered at the state employment service but received no job referrals. Eventually she obtained employment at a series of restaurant jobs either as an attendant, a waitress, or fry cook. In connection with these jobs, she incurred additional expenses for babysitting and travel to which Respondent has raised no objection. However Respondent does contend that it should not be charged for time lost between jobs because Woods left two positions alllegedly due to her own misconduct. Woods testified that at Church's Fried Chicken in late 1971, "the manager thought I was after her husband," and cut her schedule to 3 days a week so that Woods left shortly thereafter. She then went to work at Western Cafe, where the manager discharged Woods for dating her son, whom Woods later married. The evidence with respect to either of these incidents does not obviously constitute misconduct and I find no willful loss has been proven. Similarly with regard to her leaving a job at Overdrive in late 1972 because, as Woods averred, the manager was ""hassling her." An

employee need not remain under onerous conditions in order to avoid a claim of willful loss, and Respondent has adduced to the contrary.

However, as a result of the testimony of Woods, a number of adjustments are clearly in order. During her employment at the Pizza Hut in 1971, she worked 3 weeks as a waitress before going into the kitchen. As such Woods earned about $3 a day in tips. Accordingly, I will add $45 to the net interim earnings during the second quarter of 1971, resulting in net backpay of $944 for that quarter. The specification does not provide backpay for Woods during the second quarter of 1973 due to her pregnancy but does seek backpay for the first quarter. Woods stated that she left her job at Overdrive Inc. at the end of 1972 when she was already 4½ months pregnant. Although she said she looked for work in January 1973, she did not work in the first quarter, and admitted that she would not have been able to continue at Overdrive in her condition. In these circumstances, I find she was not available for work during the first quarter of 1973 and will strike the entire amount of backpay requested in the specification for that quarter. Therefore the total backpay will be reduced by $1,376.

Woods was unavailable for work after the birth of her child on May 25 until August 1, 1973. I do not find, as contended by Respondent, that she incurred willful loss by her refusal, at the time, of a job at Norfolk & Western on a late night shift, at a very low rate of pay. During this period, (third and fourth quarters of 1973), she sought employment on a regular basis following newspaper leads and visiting factories and restaurants.

Respondent contended that the period from October 22 to November 4, 1971, should not be included in the backpay period because of Woods' participation in the strike. The Board has held to the contrary. The entire duration of the strike is includable in the backpay period of employees

unlawfully discharged before the strike, and their participation does not thereby indicate unavailability for employment.[36] I find, after the above noted adjustments the total backpay due Woods to be $11,302 as appears in the Appendix.

4. Margaret Buckley

The backpay period of Buckley commenced June 14, 1970, and ended November 8, 1973. In September 1970 she obtained employment at Mid-Continent Tool in North Kansas City at a rate of $1.70 per hour. (She had been earning $2.10 at the time of her discharge). Buckley quit her job at Mid-Continent on December 23, 1970, in order to move to Smithville, Missouri, a small town of less than 5,000 population. Buckley testified that her husband is totally disabled and receives a pension from Social Security. She was unable to maintain her apartment at a rental of $125 per month on her reduced earnings at Mid-Continent and therefore moved to Smithville where she was accepted into a Government housing project at a rental of $61 per month. Buckley said that friends had informed her she would be able to obtain employment at the hospital there. However, she made no inquiry or filed any application before moving. Indeed during the balance of the backpay period she tried but never did succeed in getting a job at the Smithville hospital. Buckley did actively seek employment while at Smithville, but concededly not only were there few jobs in the area, but she had no car, and public transportation was not readily available.

Thus it is clear Buckley quit her job at Mid-Continent and moved to an area where prospects for employment were dim. In these circumstances, I find that Buckley incurred a willful loss. However, unlike Respondent, I do not believe her claim should be completely cut off. The

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[36] *Winn-Dixie Stores, Inc.*, 206 NLRB No. 125 (1973).

Board stated in *Mastro Plastics Corp.*, 136 NLRB 1342 (1962) at page 1350:

> Finally if a claimant does willfully incur losses by either unjustifiably quitting or refusing substantially equivalent employment, he is not deprived of his entire claim, but only so much of it as he would have earned had he retained or obtained the interim job.[37]

I therefore find, as did the Board in *Knickerbocker*,[38] that Buckley shall be deemed to have earned for the remainder of the backpay period the hourly wage she was receiving at the time she quit Mid-Continent. This will be computed on the basis of a 40-hour week quarterly and will be offset against her gross backpay as already determined.[39] I shall adjust the award to Buckley in accordance with these findings, as specified in the Appendix.[40]

5. David Covey

Covey's backpay period began June 14, 1970. He was largely unsuccessful obtaining employment except some farm work for about a year thereafter. Respondent con-

[37] In *Mastro*, the Board cited *Knickerbocker Plastic Co. Inc.*, 132 NLRB 1209 (1961) relied on by Respondent in its brief. However the discriminatee in *Knickerbocker* referred to by Respondent had never obtained interim employment before moving. Respondent also cited *Mastro* for disallowing Buckley's claim in full but the Board found that the particular discriminatee referred to by Respondent had she not been discharged by *Mastro* would have quit her job in order to move.

[38] *Supra*, at page 1215.

[39] The offset will be greater than the interim earnings she had in any quarter while employed at Smithville.

[40] It is interesting to note that the difference between her rate of pay at Respondent and the lesser rate at Mid-Continent was approximately the same as the difference in rent which caused her to move to Smithville.

tends that his efforts were inadequate. However, he did attempt to get work in trucking and construction, trades in which he had prior experience, and also registered with the state employment service. I find on the basis of the record, and Respondent having not adduced evidence to the contrary, that Coveey made a reasonable diligent search for work. Respondent would disqualify Covey for slight intervals but the fact that he may not have looked every week does not militate against such a finding.[41] Nor did Covey incur a willful loss, as urged by Respondent in turning down a mechanic's job which required him to buy $500 worth of tools, a sum he did not have; or a farm job which would necessitate moving his family a considerable distance. Finally, his strike activity in October 1970 did not make his unavailable for work that week.[42]

Coveey was reinstated in November 1973 to a general labor position at $2.70 per hour, although at the time of his discharge in 1970 he earned $2.75 per hour as a wire hanger adjuster, a job no longer available. He was therefore, reinstated to a position paying a lesser wage than he received more than 3 years before, despite the fact that company wage scales indicate a number of increases over that span of time. The General Counsel contends that this did not constitute a proper reinstatement, and I agree. Covey clearly had the ability to perform other jobs, for example, truck driving, and Respondent had a number of drivers, of whom five were junior to Covey. Moreover, Respondent was unable to show that any number of employees had their earnings reduced over the period.[43]

I find that Covey was not reinstated to a substantially equivalent position and will extend his backpay period un-

[41] *Cornwall Company*, 171 NLRB 342.

[42] *Winn-Dixie Stores, Inc., supra.*

[43] Respondent's Comptroller could only recall two employees, both under special circumstances.

til April 8, 1947, when he resigned.[44] I further find net backpay due him as claimed in the specification as amended at the hearing and as appears in the Appendix.[45]

6. Joseph DeMent

DeMent's backpay period began June 15, 1970, and ended November 8, 1973. After a short period of unemployment he found work on farms until the end of 1970. In the spring of 1971, DeMent entered the construction field as a laborer, became a member of the Laborer's Union and was thereafter seasonally employed throughout the backpay period.

Respondent contends that as a result of an on-the-job injury for which he received workmen's compensation, DeMent was unavailable for work, for a period of time. I agree.[46] Accordingly, I shall deduct 2 weeks' pay from the gross backpay for the fourth quarter of 1971.[47]

Respondent further contends that DeMent did not make sufficient efforts to find work during those periods when he was laid off from his construction jobs. During these times, DeMent testified that he visited the state employment service regularly and checked in at his union hall, at first, three times a week, and later, at least once a week. After his discharge, DeMent sought welding or other type plant

[44] Respondent's reliance on *Rodney Mills Inc.*, 160 NLRB 1419 (1966) is misplaced. In that case the Board refused to order a company to resume an operation in order to reinstate an employee to his former position, a quite different situation.

[45] Respondent's contention that the rental value of $50 a month for one farmhouse and $60 for another farmhouse both occupied by Covey during portions of the period is not sufficient, is a mere quibble. Moreover, the suggestion in its brief that these amounts be raised to $100 is not based on any evidence whatsoever.

[46] *Associated Transport of Texas*, 194 NLRB 62, 63 (1971)

[47] DeMent testified he was out 2 or 3 weeks but also stated he received two checks.

work without success. He then was able to obtain construction work, became a union member and was able to gain remunerative employment making more money than he had ever before. I find that during his seasonal layoffs he made reasonable and diligent efforts to seek work by checking regularly with the union hall and the state employment office.[48]

In connection with DeMent's claim, there remain the contentions of Respondent concerning absenteeism. I have already disposed of Respondent's argument that DeMent would have been terminated by the end of 1970 for excessive absenteeism. However, in rejecting General Counsel's representative employee formula and adopting that of Respondent for computing backpay, no provision was made for absenteeism. As noted previously, I have included a provision for overtime on the basis, as suggested by Respondent, that DeMent be credited with the average amount of overtime he earned during his employment. Respondent has made no recommendation with respect to the evidence of DeMent's previous absentee record, other than urging the termination of the backpay period at the end of 1970. In the use of the representative employee method, the normal absences of the representative is built into the computation. While it is only fair that some provision be made, it is also unfair to project a prior absence into the future, particularly where an employee has been employed only a short time, a little more than 2 months in DeMent's case. However, the only available evidence shows that he was absent approximately 13 percent of the time during his employment. There is no evidence as to the reasons for this record and whether it was based on an unusual experience. The absence figures of the discriminatees whom Respondent states it would have discharged show an average rate of 11.9 percent and because these represent extreme cases, I will not use that rate. But I do conclude on the basis of

[48] *I. Posner, Inc.*, 154 NLRB 202 (1965).

the entire record as to absenteeism, and noting there are no average rates for all employees, that an absenteeism factor of 7 percent should be built into DeMent's computation.[49] Accordingly, I shall reduce the gross backpay of DeMent heretofore computed at $26,785 by a rate of 7 percent on a quarterly basis. This will appear in the Appendix annexed hereto in addition to the diminution of 2 weeks gross backpay found for the fourth quarter of 1971.[50]

7. June Elliott

The backpay period for Elliott began June 16, 1970, and ended November 8, 1973. After her discharge she was unable to obtain employment until October 1971, an interval of more than a year during which Respondent contends that Elliott failed to make an adequate attempt to find a job. However she testified credibly to having visited and applied at many plants and businesses during the time to no avail. Respondent appears particularly upset at her admitted failure to consult newspaper advertisement but I know of no requirement that she do so. In addition to her personal visits, she also registered at the state employment office.

Respondent also urges that Elliott was not motivated by reason of her being supported by her husband. While, of

[49] Cf. *J. H. Rutter-Rex Manufacturing Co., supra.*

[50] I have computed the gross backpay detailed in the Appendix as follows: The balance of the second quarter of 1970 was computed at a straight rate of $3.25 per hour. DeMent would have received an increase to $3.50 per hour the first week of July 1970. Thereafter his gross quarterly earnings including 6.5 hours of overtime per month were computed at $1,922, which was then reduced by 7 percent to $1,787 per quarter. On January 1, 1973, he would have received a pay increase to $3.90 per hour. Using the same overtime and absence factors, his quarterly earnings for 1973 were computed as $1,972. Interim earnings were credited as appear in the specification as were expenses such as mileage and union dues, not challenged by Respondent, and which I find to be reasonable.

course, such support does not discharge her of her obligation to seek and accept employment, the discriminatee's motivation to seek and accept employment, the discriminatee's motivation is not the issue. People may be motivated to seek employment for a variety of reasons, some of which may not be economic.[51] The issue is whether Mrs. Elliott made a reasonable and diligent effort to obtain a job during her period of unemployment. In view of her testimony, which is uncontradicted and credited, Respondent has not fulfilled its burden of proving that she failed to do so.

I do find, however, in agreement with Respondent that she was unavailable for employment for 2 weeks during the first quarter of 1972 due to the death of her father, and I shall deduct 2 weeks' pay from gross backpay for that quarter.[52]

8. James Walter Forbis

Forbis had been employed by Respondent on May 15 and discharged on June 15, 1970. After his discharge he was unemployed until August 18, 1970, when he obtained a job and has been employed ever since. Respondent disputes Forbis' efforts to find work during his 2 months of unemployment. Contrary to Respondent's contention, I find that Forbis did seek referral at the Arkansas State Employment Office. As a resident of Arkansas prior his job with Respondent, his return to seek employment the day after his discharge rather than staying in the Kansas

[51] I adhere to my ruling, made at the hearing, which prevented Respondent reading into the record, from the Elliotts' joint tax return, the income received by her husband. Not only because this bears on motive which is irrelevant but I also believe it would be an unwarranted invasion of Mr. Elliott's privacy. He is not a claimant herein.

[52] I shall allow the allowances claimed for uniforms because it is clear that these were required by her employer. *The Laidlaw Corp.*, 207 NLRB No. 94 (1973)

City area does not disqualify him. Forbis testified he sought work at the state employment office and at several local plants in Arkansas. He then returned to Missouri several days later, resumed his search, and finally obtained work through a private employment agency in Kansas City.[53] Respondent adduced no evidence that Forbis made other than a good-faith search for employment during the 2-month interval that he was out of work, and I conclude that Respondent should make him whole by the amount set forth in the specification as amended.

9. Ronald Greathouse

After his discharge Ronald Greathouse immediately sought employment. He followed newspaper leads, visited companies, and registered at the state employment service as well as private agencies, and I credit his testimony in that regard. Respondent has not adduced any evidence to indicate that he made other than a reasonable and diligent search for a job. Its contention that Ronald Greathouse would have had to leave his job or be discharged had he remained with Respondent because of a conflict with his attendance at college is without merit and based on sheer conjecture. I conclude, therefore, that he be made whole in the amount as provided in the amended specification.[54]

10. William Greathouse

William Greathouse was unemployed after his discharge until the first quarter of 1971 and he worked steadily there-

[53] I shall allow the agency fee of $249 as claimed in the specification.

[54] The specification deletes from gross backpay those periods when Ronald Greathouse was unavailable because of his attendance at college or in the military service. There is an arithmetical error in the amended specification for the third quarter of 1970. The net backpay should be $447 for that quarter rather than $347. The corrected amount is shown in the Appendix annexed hereto.

after. He testified credibly concerning his efforts to find work which included registration at state and private agencies, following up newspaper advertisements and visiting plants and companies. Other than its complaint about Greathouse's obesity, voiced in its brief, a disqualifying factor at some employers, Respondent could submit no probative evidence that he had not made a diligent search for employment. I therefore find that William Greathouse should be made whole in the amount set forth in the specification as amended.

11. Marilyn Kimberlin

Kimberlin sought employment immediately after her discharge by registration at the state employment service and other agencies and by personal application at many employers. At the end of 1970 she obtained a position as a bank teller and was thereafter continously employed. Respondent has not introduced any evidence to indicate that her efforts were other than diligent. However, based upon Kimberlin's testimony that she first sought plant work, Respondent argues that she thereby excluded office work, at which she had prior experience. Kimberlin testified, without contradiction, that she had been doing plant work for several years and did not have necessary clothes for office work at that time. This is akin to the case of claimants who lower their sights, and, absent any evidence that the claimant has failed to make a diligent search, any doubts should be resolved in favor of the discriminate.[55] Indeed, often plant work may be more remunerative than office work.

As to Kimberlin having voluntarily transferred to a 3-day workweek in the second quarter of 1973, her gross backpay was therefore reduced proportrionally. Respondent's contention that she would not have been able to ac-

[55] *United Aircraft Corporation*, 204 NLRB No. 131 (1973)

complish this had she continued to work at its plant is, again, speculative and without merit.

I conclude and recommend that Kimberlin be made whole in the amount set forth in the specification as amended.

12. John Charles Lankford

Lankford is one of the two discriminatees for whose computation I rejected the representative employee formula and adopted that recommended by the Respondent. As noted, I have computed his backpay on a quarterly basis and arrived at a total gross backpay of $28,834. This figure is before adjustments to be made with respect to any interim earnings or expenses as developed at the hearing.[56]

After his discharge he sought work as a maintenance machinist in the Kansas City area. He testified credibly that he visited plants and registered at several agencies. He then obtained employment at Howard Johnson's. Respondent contends that there were advertisements for machinists in the area and Lankford left his field of expertise by taking the restaurant job. This contention is without merit absent evidence that he was offered and refused work as a machinist. Similarly, Respondent also contends that, in giving up the Howard Johnson job and returning to his home in Illinois, Lankford left a good labor market. However, his home is in the St. Louis area, also a good labor market, and there is no showing that he did not actively pursue a machinist's job there before accepting another restaurant position. I find that at all times Lankford made a reasonably diligent search for employment.

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[56] In Lankford's case, no overtime was included in view of testimony by Respondent's witnesses that Liberty employees had little or no overtime during the backpay period and Lankford had worked no overtime during his employment. Nor was any factor for absenteeism included as there was no evidence regarding Lankford on that subject.

However, a number of adjustments are called for in connection with his interim earnings. Lankford testified that he received three meals a day during the almost 3 weeks he worked at Howard Johnson's. I shall allow $4 a day for meals, and, as it appears he worked about 15 days, add $30 to interim earnings received from Howard Johnson's in each of the second and third quarters of 1970.

Lankford stated he was given a meal a day at Skaggs and its successor, Christopher Enterprises, but he also said it was just a sandwich. As no values are given I shall add $1 per day to the interim earnings received from these two employers. Thus interim earnings will be increased by the following amounts:

1970 — 3rd quarter —	$15
1970 — 4th quarter —	70
1971 — 1st quarter —	75
1971 — 2nd quarter —	75
1971 — 3rd quarter —	70
1971 — 4th quarter —	40
1972 — 1st quarter —	35
1972 — 2nd quarter —	20

During the second quarter of 1971, Lankford left the Skaggs restaurant to work as a machinist at H. Mfg. Co. However, as this was a temporary job, he left it after a couple of weeks to return to Skaggs and seek work as a machinist while employed at the restaurant. Backpay need not be tolled in these circumstances.

In the first quarter of 1972, there was an interval of one week between his leaving a Cruden Martin Manufacturing job and starting a new job at Steuby Manufacturing when Lankford was unable for work. I shall deduct one week from gross backpay in that quarter.

During the second quarter of 1972, Lankford commenced driving a taxicab for Alton City Cab, a now defunct com-

pany whose records are not completely available. It is therefore necessary to reconstruct Lankford's earnings for a portion of the backpay period on the basis of his testimony Lankford said he began working for Alton Cab in April 1972. Since he had already earned $259 plus $20 for meals in that quarter from Christopher Enterprise, it will be assumed he started at Alton in the last week of April. With Alton, he testified he earned between $10 and $20 per day, plus $10 a week for tips and knockdowns.[57] Lankford further testified he worked 6 days a week. I shall compute his interim earnings for periods that the Alton records are unavailable on the basis of $90 per week plus $10 for tips and knockdowns. In the second quarter of 1972, commencing the last week of April, that would total 9 weeks or $900, which I shall add to interim earnings for that quarter.

His earnings at Alton for the third and fourth quarters of 1972 are reported by Social Security and appear in the specification. To these recorded interim earnings there must be added for tips and knockdowns the sum of $130 in each quarter.

There are no reports for Alton earnings in 1973. Therefore interim earnings from Alton City Cab for the first quarter quarter of 1973, on the same basis, would total $1,300. He commenced work full-time for American Steel Foundries on May 2, so interim earnings from Alton City Cab will be charged at $400 for the second quarter of 1973.

I therefore recommend that Lankford's gross backpay be computed on the basis of the formula heretofore described and reduced by the interim earnings detailed in the specification and further adjusted above, and that he be awarded net backpay as set forth in the Appendix hereto.

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[57] A "breakdown" consists of pocketing a fare for an unrecorded trip.

13. Shirley Lauderdale (Chamberlin)

Lauderdale's backpay period was broken by several intervals when she was unavailable. She attended school in 1971 to become a cosmeologist, worked briefly in that field, and returned to factory work because of a skin problem. Respondent's contentions regarding the amended specification filed in her behalf are mainly limited to the intervals between jobs, alleging that she did not make immediate efforts to secure employment.

As a result of Lauderdale's testimony and the records submitted by her employers, certain adjustments to the amended specification appear necessary.

During the fourth quarter of 1971, it is claimed that she became available for work on November 10, and obtained a job at American Bakeries on December 5. But she testified that she did not look for work between November 10 and December 5. Therefore her gross backpay will be reduced by an additional 4 weeks which results in gross backpay of $338. As her interim earnings were also $338, I find that Lauderdale is not entitiled to any backpay for the fourth quarter of 1971.

Lauderdale left American Bakeries on March 4, 1972, to stay at home for a month, according to her testimony. She was thus unavailable for the balance of the second quarter of 1972, and net backpay of $4 for that quarter as provided in the amended specification will thereby be reduced to zero.

The amended specification states that Lauderdale was unavailable for work from April 1 through May 20, 1972. The report submitted by her next employer, Ronnie Fashion Salons, shows that she commenced working there on June 18. Lauderdale testified that jobs were always available at Ronnie's and there is no evidence that she looked elsewhere before June 18. I find that she was unavailable for 11 weeks of the second quarter of 1972 thus, her gross

backpay for that quarter is reduced to $210, less $160 net interim earnings, leaving net backpay of $50.[58]

Her next employment was at Zodiac Beauty Salon where she began April 9, 1973, and worked until June 8, 1973. Thereafter she obtained a job at Kitterman, Inc., on July 18, 1973. Lauderdale testified she did not look for work before Zodiac or between Zodiac and Kitterman. In each case, she was given the job when she applied. As her sole employment in the second quarter of 1973 occurred between April 9 and June 8, and she did not seek work in that quarter before and after those dates, I shall credit her with gross backpay for 9/13 of the quarter rather than the full quarter as provided in the amended specification. Thus gross pay is reduced to $1,067 and, less $362 interim earnings, leaves net backpay of $645. Similarly, as she commenced working at Kitterman's on July 18, I shall reduce gross backpay for the third quarter of 1973 by 2 weeks bringing it to $1,401 and adjust the net backpay for that quarter to $573.

Finally, Kitterman, her employer, has reported that Lauderdale left that job on October 19, 1973, voluntarily. Gross backpay for the fourth quarter of 1973 will be reduced by 2 weeks to $361 and net backpay to $154.

Except as detailed above the specification with respect to Lauderdale as amended at the hearing is adopted and I conclude that she be awarded backpay in the amount set forth in the Appendix.

14. Sharon Meier

The backpay period for this claimant ran from June 15, 1970, to November 8, 1973. During this entire period she

[58] I credit Lauderdale's testimony that tips were almost nonexistent at Ronnie's, and will not estimate them as any amount would be clearly minimal. Her low earnings, based on commissions, attest to the dearth of customers.

never obtained any job. Her only earnings were derived from babysitting prior to Christmas of 1971 and 1972 to enable neighbors to do some shopping.[59] Meier testified that after her discharge, she registered at the Missouri State Unemployment Office and looked for work at banks in the Liberty area as well as plants in the North Kansas City area. She collected unemployment benefits for a period of approximately 3 months. The requirements to remain eligible for unemployment benefits have been held to be sufficient to satisfy the requirements to remain eligible under the Act.[60] Accordingly, I have no problem finding that Meier is entitled to the backpay claimed in the specification through the third quarter of 1970. Contrary to the specification, however, I find Meier was unavailable for employment throughout the fourth quarter of 1970, as she testified that she stopped looking for work in the fifth month of her pregnancy and her child was born on February 1, 1971.

Except for the time deducted for two pregnancies, and two illnesses, it is contended by General Counsel that Meier is entitled to backpay for the entire 3½ year period. This must be based on her conducting a reasonable diligent search for employment. Meier has testified that throughout the period she was out looking for work 2 or 3 weeks of every month, and 2 or 3 days in each of those weeks. She states she visited banks, finance companies, I do not credit Meier's testimony. While concededly she may have sought work at some places (after her unemployment benefits ran out), I do not consider her seach to have been diligent.

The claimant resides in a large metropolitan area with a great number of plants, stores, and offices. A job is not always easy to find but in 3½ years, normally one would

[59] The specification credits interim earnings of $200 in the fourth quarter of each of those years.

[60] *J. H. Rutter-Rex Manufacturing Co.*, 194 NLRB 19, 24 (1971).

turn up as it did for every one of the discriminatees involved in this case. Meier is a high school graduate; she was schooled, but not experienced, in office work. Her horizon was not limited to plant work. She testified that in all of her search, she only filled out one application and that was at Guy's Potato Chips, a plant adjacent to Respondent. Yet she said she went to many banks and finance companies which are normally the type of organizations that accept or even require written applications. Meier never looked at advertisements in the large daily papers of Kansas City, she merely followed some tips from friends and drove her car. She did not return to the Missouri State Employment Agency after her benefits ran out nor did she try any private agency.

During the backpay period Meier gave birth to two children, born February 1, 1971, and December 15, 1972. Of course this is not a disqualifying factor, but her testimony in this regard reflects on her credibility. The specification would have us believe that she was available and looking for work up to her eighth month of pregnancy. Meier testified at first that she looked for work until 2 or 3 months before the second child was born in 1972. She then changed her testimony to state that she stopped looking for work after the fifth month of pregnancy.

Finally, Meier rejected the offer of reinstatement made by Respondent in November of 1973. She was not working at the time and testified that she was ill, but did not so inform Respondent. After the backpay period expired Meier apparently obtained employment in April 1974, but was not employed at the time of the hearing.

Although any one of the factors described above may not be sufficient to disqualify a claimant for backpay, the totality of the circumstances, in addition to my assessment of the credibility, lead me to conclude that Meier did not diligently pursue employment after the unemployment benefits

ran out. I shall therefore limit her entitlement to the amount claimed in her specification for the second and third quarter of 1970 as set forth in the Appendix annexed hereto.[61]

15. Virgie Peterson McCannon

After her discharge Peterson registered with the state employment office, and actively sought work. Except for some rather lengthy periods of unavailability due to illness or pregnancy, subtracted from gross backpay, Peterson was employed or diligently looked for work. Respondent offered no evidence to indicate her search was unreasonable or inadequate. For a portion of the period, Peterson worked on a part-time basis, but appropriate credit was allowed in the computation. Respondent's contention that this foreshortened the backpay period, as it would not have permitted this had she remained employed, is speculative.

However, I do find, as contended by Respondent, that the specification contains an overcharge for additional mileage mmaintaining interim employment. Peterson had moved from the place she resided when employed by Respondent. Since the move was unrelated to her employment, the mileage differential is computed from the point of her new residence.[62] For the fourth quarter of 1972, I find the difference in mileage to be 14 miles per day and therefore reduce the amount charged from $65 to $21. During the first quarter of 1973, the difference was 16 miles per day and mileage charge is reduced to $56 from $62.

As Peterson testified that she employed a baby sitter while working for Respondent, I shall strike the babysit-

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[61] Respondent's Motion to Strike Meier's testimony, made at the hearing on the ground that she failed to produce tax returns and other documents pursuant to subpoena, is denied. It appears that such of those documents requested that she might have had, have been lost.

[62] *Gray Aircraft Corp.*, 210 NLRB No. 88 (1974).

ting expenses charged at $75 for the fourth quarter of 1972 and $175 for the first quarter of 1973.

Finally Peterson testified she spent a total of about one day away from her job in 1971 in connection with her divorce proceedings, so I shall reduce gross backpay by one day in the third quarter of that year.

Except as modified above, I find net backpay due to Peterson in accordance with the amended specification, and as set forth in the Appendix annexed hereto.

16. Elaine Peukert

Upon her discharge, Peukert registered with the state employment service and drew unemployment benefits until December 1970. She received no referrals from the state agency and looked for work in the usual manner by following newspaper ads, personal visits and filing applications. Respondent adduced no evidence to the contrary and I find that during the periods of her unemployment, Peukert made a reasonable and diligent search.[63]

However, there are a few adjustments necessary to be made to the amended specification. Peukert testified that she was unavailable one day during the fourth quarter of 1970 because of a court appearance. She went on to say that this occurred 5 more days during the backpay period. In addition she lost still another day taking her daughter to an out of town hospital. Since Peukert could not recall the dates, I shall deduct a total of 7 days from gross backpay and lump them for the sake of convenience in the fourth quarter of 1970.

[63] There is no purpose in seeking to characterize Respondent's contention in its brief urging that Peukert be disqualified by reason of her refusal of a part-time job from 5 a.m. to 7 a.m. at $1 per hour.

In the fourth quarter of 1971 expenses for uniforms of $100 will be reduced to $24 as it appears that Peukert, due to her back condition, also required similar shoes and hosiery while working for Respondent. I shall also reduce the cleaning expenses claimed for the first quarter of 1972 from $66 to $33 because the former amount would be 9 percent of her wages at Golden Age Lodge, a seemingly exorbitant expense.

Finally, I find Peukert sustained a willful loss of earnings by leaving the Golden Age Lodge job a month before her employment began at Whitaker Cable. As she received $1.70 per hour at Golden Age, I shall increase her interim earnings stated as $414 for the first quarter of 1972 by 4 weeks' salary at $68 per week making a new total of $686 less $33 expenses or $653 net interim earnings for that quarter.

I therefore find net backpay for Peukert as requested in the amended specification but adjusted above and fully set forth in the Appendix hereto.

V. The Remedy

For the reasons described above, I find that Respondent's obligations to the discriminatees herein will be discharged by the payment to them of the respective amounts set forth in the Appendix annexed hereto. Such amounts shall be payable plus interest at the rate of 6 percent per annum to accrue commencing with the last day of each calendar quarter of the backpay period on the amount due and owing for each quarterly period as set forth in the Appendix, and continuing until the date this Decision is complied with, minus any tax withholding required by Federal and State laws.[64]

[64] As is provided for in *F. W. Woolworth Company*, 90 NLRB 289, and *Iris Plumbing & Heating Co.*, 138 NLRB 716.

The gross backpay figures in the Appendix are based upon those set forth in the specification as amended at the hearing except where I have modified them as described above, particularly with respect to discriminatees DeMent and Lankford. The Appendix states the figures for each quarter in which any backpay is found to be due. The omission of a quarter from the Appendix means that no backpay has been found to be due for that quarter.

Upon the basis of the foregoing findings and conclusions, and upon the entire record in this proceeding, I hereby issue the following recommended:[65]

SUPPLEMENTAL ORDER

Respondent, Mid-West Hanger Co. and Liberty Engineering Corp., of Liberty, Missouri, its officers, agents, successors and assigns, shall make the employees involved in this proceeding whole by payment to them of the following amounts together with interest at the rate of 6 percent per annum, in the manner set forth in the section of this Decision entitled 'The Remedy,'' and continuing until the amounts are paid in full, but minus tax withholding required by Federal and State laws:

John Ashby	—	$13,710
Kim Bristow Woods	—	11,302
Margaret Buckley	—	6,846
David Covey	—	7,286
Joseph DeMent	—	8,731
June Elliott	—	8,737

[65] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

James W. Forbis	—	5,594
Ronald Greathouse	—	3,010
William Greathouse	—	6,197
Marilyn Kimberlin	—	5,118
John Charles Lankford	—	11,844
Shirley Lauderdale Chamberlin	—	1,860
Sharon Meier	—	1,167
Michael Owens	—	781
Virgie Peterson McCannon	—	4,907
Elaine Peukert	—	14,048
John Sells	—	1,392

Dated at Washington, D.C.

May 20, 1975

/s/ Julius Cohn
JULIUS COHN
Administrative Law Judge

APPENDIX

JD-270-75

Name	Year and Quarter	Gross Backpay	Interim Earnings	Expenses	Net Interim Earnings	Net Backpay
John Ashby	1970—2	$ 220	$NONE	90	279	691
	1970—3	970	369		279	691
	1970—4	1,136	361		361	775
	1971—1	1,096	361		361	735
	1971—2	1,299	534		534	765
	1971—3	1,258	456		456	802
	1971—4	1,465	256		256	1,209
	1972—1	1,545	382		382	1,163
	1972—2	1,366	264		264	1,102
	1972—3	1,347	471		471	876
	1972—4	1,451	471		471	980
	1973—1	1,376	471		471	905
	1973—2	1,454	208		208	1,246
	1973—3	1,656	119		119	1,537
	1973—4	1,046	342		342	704
TOTAL						$13,710

APPENDIX

JD-270-75

Name	Year and Quarter	Gross Backpay	Interim Earnings	Expenses	Net Interim Earnings	Net Backpay
Kim Bristow Woods	1970—3	$ 970	$NONE	$	$	$ 970
	1970—4	1,136	NONE			1,136
	1971—4	1,096	43	30	13	1,083
	1971—2	1,299	552	197	355	944
	1971—3	1,064	745	187	558	506
	1971—4	1,465	665	20	645	820
	1972—1	1,545	NONE			1,545
	1972—2	1,366	818	287	581	785
	1972—3	1,347	845	189	656	691
	1972—4	1,451	616	189	427	1,024
	1973—3	1,018	NONE			1,018
	1973—4	780	NONE			780
TOTAL						$11,302

APPENDIX JD-270-75

Name	Year and Quarter	Gross Backpay	Interim Earnings	Expenses	Net Interim Earnings	Net Backpay
Margaret Buckley	1970—2	$ 185	$NONE	$	$	$ 185
	1970—3	970	115			855
	1970—4	1,049	852	20	832	217
	1971—1	1,096	884		884	212
	1971—2	1,299	844		884	415
	1971—3	1,258	884		884	374
	1971—4	1,465	884		884	581
	1972—1	1,545	884		884	661
	1972—2	1,366	884		884	482
	1972—3	1,347	884		884	463
	1972—4	1,451	884		884	567
	1973—1	1,376	884		884	492
	1973—2	1,454	884		884	570
	1973—3	1,656	884		884	772
TOTAL						$6,846

72a

APPENDIX JD-270-75

Name	Year and Quarter	Gross Backpay	Interim Earnings	Expenses	Net Interim Earnings	Net Backpay
David Covey	1970—2	$ 264	$NONE	$	$	$ 264
	1970—3	1,352	12		12	1,340
	1970—4	1,515	150		150	1,365
	1971—1	1,440	220		220	1,220
	1971—2	1,665	974	31	943	722
	1971—4	2,085	901		901	1,184
	1972—1	2,069	1,239		1,239	830
	1974—1	1,733	1,372		1,372	361
TOTAL						$7,286
Joseph DeMent	1970—2	$ 312	$NONE	$	$ 312	$ 312
	1970—3	1,787	1,423		1,423	364
	1970—4	1,787	1,314		1,314	473
	1971—1	1,787	NONE		NONE	1,787
	1971—2	1,787	1,845	195	1,650	137
	1972—1	1,787	735	58	677	1,110
	1972—4	1,787	NONE		NONE	1,787
	1973—1	1,992	NONE		NONE	1,992
	1973—4	769	NONE		NONE	769
TOTAL						$8,731

73a

APPENDIX JD-270-75

Name	Year and Quarter	Gross Backpay	Interim Earnings	Expenses	Net Interim Earnings	Net Backpay
June Elliott	1970—2	$ 176	$NONE	$	$NONE	$ 176
	1970—3	970	NONE		NONE	970
	1970—4	1,136	NONE		NONE	1,136
	1971—1	1,096	NONE		NONE	1,096
	1971—2	1,294	NONE		NONE	1,294
	1971—3	1,258	NONE		NONE	1,258
	1971—4	1,465	867	204	663	802
	1972—1	1,307	1,146	132	1,014	293
	1972—2	1,366	1,177	132	1,045	321
	1972—4	1,451	1,349	160	1,189	262
	1973—1	1,376	1,230	174	1,056	320
	1973—2	1,454	1,166	174	992	462
	1973—3	1,656	1,525	174	1,351	305
	1973—4	605	628	65	563	42
TOTAL						$8,737

74a

APPENDIX JD-270-75

Name	Year and Quarter	Gross Backpay	Interim Earnings	Expenses	Net Interim Earnings	Net Backpay
James W. Forbis	1970—2	$ 240	$NONE	$	$NONE	$ 240
	1970—3	1,352	534	259	275	1,077
	1970—4	1,515	1,320	33	1,287	228
	1971—1	1,440	1,166	33	1,133	307
	1971—2	1,665	1,254	33	1,221	444
	1971—3	1,819	1,321	33	1,288	531
	1971—4	2,085	1,325	33	1,292	793
	1972—1	2,069	1,384	33	1,351	718
	1972—2	1,713	1,535	11	1,524	189
	1972—3	1,953	1,689		1,689	264
	1972—4	1,926	1,600		1,600	326
	1973—1	1,953	1,751		1,751	202
	1973—2	1,953	1,770		1,770	183
	1973—3	1,979	1,887		1,887	92
TOTAL						$5,594

75a

APPENDIX JD-270-75

Name	Year and Quarter	Gross Backpay	Interim Earnings	Expenses	Net Interim Earnings	Net Backpay
Ronald Greathouse	1970—2	$ 221	$NONE	$	$ 221	$ 221
	1970—3	646	274	75	199	447
	1970—4	175	NONE		NONE	175
	1971—1	1,096	673		673	423
	1972—1	1,426	679	100	579	847
	1972—2	1,366	1,089		1,089	277
	1972—3	1,347	1,129		1,110	237
	1972—4	1,451	1,129		1,129	322
	1973—3	1,376	1,340	25	1,315	61
TOTAL						$3,010

APPENDIX JD-270-75

Name	Year and Quarter	Gross Backpay	Interim Earnings	Expenses	Net Interim Earnings	Net Backpay
William Greathouse	1970—2	$ 220	$NONE	$	$NONE	$ 220
	1970—3	1,352	NONE		NONE	1,352
	1970—4	1,515	69	125	NONE	1,515
	1971—1	1,440	598		598	842
	1971—2	1,665	1,455		1,455	210
	1971—3	1,819	1,447		1,447	372
	1971—4	2,085	1,502		1,502	583
	1972—1	2,069	1,599		1,599	470
	1972—2	1,713	1,683		1,683	30
	1972—3	1,953	1,893		1,893	60
	1972—4	1,926	1,886		1,886	40
	1973—1	1,953	1,792		1,792	161
	1973—2	1,953	1,851		1,851	102
	1973—3	1,977	1,737		1,737	240
TOTAL						$6,197

APPENDIX

JD-270-75

Name	Year and Quarter	Gross Backpay	Interim Earnings	Expenses	Net Interim Earnings	Net Backpay
Marilyn Kimberlin	1970—2	$ 192	$NONE	$	$NONE	$ 192
	1970—3	970	NONE		NONE	970
	1970—4	1,136	162		162	974
	1971—1	1,096	961		961	135
	1971—2	1,299	977		977	322
	1971—3	1,258	868	38	830	428
	1971—4	1,465	1,404	160	1,244	221
	1972—1	1,545	1,404	273	1,131	414
	1972—2	1,366	1,425	273	1,152	214
	1972—3	1,347	1,425	273	1,152	195
	1972—4	1,451	1,528	273	1,255	196
	1973—1	1,164	1,200	228	972	192
	1973—2	1,220	1,003	260	743	477
	1973—3	994	984	178	806	188
TOTAL						$5,118

APPENDIX

JD-270-75

Name	Year and Quarter	Gross Backpay	Interim Earnings	Expenses	Net Interim Earnings	Net Backpay
John Charles Lankford	1970—2	$ 330	$ 158	$ 30	$ 127	$ 203
	1970—3	2,040	358		358	1,682
	1970—4	2,080	940		940	1,140
	1971—1	2,080	1,013		1,013	1,067
	1971—2	2,080	1,232		1,232	848
	1971—3	2,080	982		982	1,098
	1972—1	1,920	985		985	935
	1972—2	2,080	1,179		1,179	901
	1972—3	2,080	704		704	1,376
	1972—4	2,080	1,198		1,198	882
	1973—1	2,288	1,300		1,300	988
	1973—2	2,288	1,814		1,814	474
	1973—3	2,288	2,038		2,038	250
TOTAL						$11,844

APPENDIX

JD-270-75

Name	Year and Quarter	Gross Backpay	Interim Earnings	Expenses	Net Interim Earnings	Net Backpay
Shirley Lauderdale Chamberlin	1970—2	$ 163	$NONE	$	$NONE	$ 163
	1970—3	373	309	18	291	82
	1970—4	1,136	1,004		1,004	132
	1971—1	169	155		155	14
	1972—2	210	186	26	160	50
	1972—3	207	160		160	47
	1973—2	1,067	362		362	645
	948	120	828	120	828	573
	1973—4	361	243	36	207	154
TOTAL						$1,860
Sharon Meier	1970—2	$ 197	$NONE	$	$NONE	$ 197
	1970—3	970	NONE		NONE	970
TOTAL						$1,167

APPENDIX

JD-270-75

Name	Year and Quarter	Gross Backpay	Interim Earnings	Expenses	Net Interim Earnings	Net Backpay
Michael Owens	1970—2	$ 242	$NONE	$	$ 242	$ 242
	1971—1	1,440	1,435	180	1,255	185
	1971—3	1,819	1,955	180	1,774	45
	1972—1	2,069	1,940	180	1,760	309
TOTAL						$ 781
Virgie Peterson McCannon	1970—2	$ 192	$NONE	$	$NONE	$ 192
	1970—3	970	NONE		NONE	970
	1970—4	1,049	NONE		NONE	1,049
	1971—1	422	NONE		NONE	422
	1971—2	1,199	NONE		NONE	1,199
	1971—3	1,239	830		830	409
	1972—4	363	228	21	207	156
	1973—1	798	354	66	288	510
TOTAL						$4,907

APPENDIX JD-270-75

Name	Year and Quarter	Gross Backpay	Interim Earnings	Expenses	Net Interim Earnings	Net Backpay
Elaine Peukert	1970—3	$1,352	$NONE	$	$NONE	$1,352
	1970—4	1,354	NONE		NONE	1,354
	1971—1	1,440	NONE		NONE	1,440
	1971—2	1,665	26		26	1,639
	1971—3	1,819	624		624	1,195
	1971—4	2,085	618	24	594	1,491
	1972—1	2,069	686	33	653	1,416
	1972—2	1,713	1,033	56	977	736
	1972—3	1,953	1,392	21	1,371	582
	1972—4	1,629	603	14	589	1,040
	1973—1	1,953	1,187	21	1,166	787
	1973—2	1,953	1,505	21	1,484	469
	1973—3	1,979	1,458	21	1,437	542
	1973—4	667	676	14	662	5
TOTAL						$14,048
John Sells	1970—2	$ 476	$NONE	$	$NONE	$ 476
	1970—4	2,834	2,541	50	2,491	343
	1971—1	2,834	2,261		2,261	573
TOTAL						$ 1,392